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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 115.

MATHIAS SCHMIDINGER, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO, ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED AUGUST 8, 1910.

(22,288.)

(22,288.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 667.

MATHIAS SCHMIDINGER, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO, ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of June, in the Year of our Lord One Thousand Nine Hundred and Ten, Within and for the State of Illinois.

Present: Alonzo K. Vickers, Chief Justice; James H. Cartwright, Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Bailiff.

Attest:
J. McCAN DAVIS, *Clerk*.

No. 7245.

CITY OF CHICAGO, a Municipal Corporation, Appellee,
vs.
MATHIAS SCHMIDINGER, Appellant.

Appeal Circuit Court Cook.

Be it remembered, to-wit, on the 6th day of June A. D. 1910, the same being one of the days of the term of Court aforesaid, a record of proceedings in the Circuit Court of Cook County was filed by appellant Mathias Schmidinger in the office of the clerk of the Supreme Court in words and figures following to-wit:

1 7245.

Record to Supreme Court.

Gen. No. 283,773.

CITY OF CHICAGO
vs.
SCHMIDINGER.

Filed Jun- 6, 1910.

J. McCAN DAVIS,
Clerk of Supreme Court.

2 STATE OF ILLINOIS,
Cook County, ss:

Pleas before the Honorable Thomas G. Windes, one of the Judges of the Circuit Court of Cook County, Illinois, at a term thereof begun and held at Chicago in the Court House in said County and State, on the third Monday (being the 16th day) of May, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fourth.

Present, Honorable Thomas G. Windes one of the Judges of the Circuit Court of Cook County, State of Illinois.
John E. W. Wayman, State's Attorney.
Christopher Strassheim, Sheriff.

Attest:

JOSEPH E. BIDWILL, JR., *Clerk.*

Be it remembered that heretofore, to-wit, on the 12th day of March A. D. 1908, a certain declaration was filed in the office of the clerk of said court in words and figures following, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Debt.

City of Chicago, by Edwin H. Cassels, its attorney, complains of Mathias Schmidinger, defendant, of a plea of debt:

1. For that whereas the said City of Chicago is a municipal corporation duly incorporated under the general laws of the State of Illinois; and

3 Whereas, the City Council of said City of Chicago did upon the sixth day of January A. D. 1908, duly pass an ordinance entitled "An Ordinance regulating the sale and prescribing the weight and quality of bread in the loaf sold or offered for sale within the City of Chicago," which said ordinance was thereafter duly approved and signed by his Honor, the Mayor of said City of Chicago and was upon the ninth day of January A. D. 1908, duly published in the manner provided by law in the "Proceedings of the City Council" a publication published by authority of the City Council of said City of Chicago. Said ordinance was in words and figures as follows, to-wit:

An Ordinance Regulating the Sale and Prescribing the Weight and Quality of Bread in the Loaf Sold or Offered for Sale Within the City of Chicago.

Be it Ordained by the City Council of the City of Chicago:

SECTION 1. All bread made or procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago shall be made in a clean and sanitary place of good and wholesome flour or meal, and shall contain no deleterious substance or material.

SECTION 2. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago shall weigh a pound avoirdupois (except as hereinafter provided) and such loaf shall be considered to be the standard loaf in the City of Chicago. Bread may also be made or procured for the purpose of sale, sold, offered or exposed for sale, in half, three-quarter, double, triple, quadruple, quintuple or sextuple loaves, and in no other way.

4 Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the city shall have affixed thereon in a conspicuous place a label at least one inch square or if round, at least one inch in diameter, upon which label there shall be printed in plain type, the letters and figures of which shall be printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type commonly known as twelve point full face square Gothic capital letters and figures, (being substantially such type as is described in Specimen book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic Title number 82, capital letters and figures, and in the specimen book of 1906 of the American Type Founders Company as twelve point lining Gothic number 520, capital letters and figures, or similar type) the weight of the loaf in pound, pounds or fraction of a pound avoirdupois, whether the loaf be a standard loaf or not. The business name and address of the maker, baker or manufacturer of the loaf shall also be printed plainly on each label.

SECTION 3. Every maker, baker or manufacturer of bread, every proprietor of a bakery or bakeshop, and every seller of bread in the City of Chicago shall keep scales and weights, suitable for the weighing of bread in a conspicuous place in his bakery, bakeshop or store, and shall, whenever requested by the buyer and in the buyer's presence, weigh the loaf or loaves of bread sold or offered for sale.

SECTION 4. If any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale within the City of Chicago, any bread which is not made of good and wholesome flour or meal, and bread which contains a deleterious substance or material, any bread the loaf or loaves of which are not standard, half, three quarter, double, triple, quadruple, quintuple or sextuple loaves as defined in section 2 of this ordinance, or any bread

5 which is not made in a clean and sanitary place, or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the City of Chicago any standard loaf or loaves of bread which do not weigh one pound each, or any bread the loaf or loaves of which do not weigh as much as the weight marked thereon, or any bread the loaf or loaves of which do not have affixed

thereon the label marked as hereinbefore provided, contrary to the provisions of this ordinance, such person, firm or corporation shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

SECTION 5. The provisions of this ordinance other than the provisions of section 1 and section 4 (so far as section 4 relates to violations of section 1) shall not apply to crackers, pretzels, biscuits, buns, scones, rolls or loaves of fancy bread weighing less than one-fourth of a pound avoirdupois, or to what is commonly known as "stale bread" sold as such, provided the seller shall at the time of sale, expressly state to the buyer that the bread so sold is stale bread.

SECTION 6. Sections 184, 185 (as amended October 16, 1905), 186, 189, 190 and 191 of Chapter XIII of the Revised Municipal Code of Chicago of 1905 are hereby repealed.

SECTION 7. This ordinance shall be in force on and after its passage and publication.

Said ordinance passed as hereinbefore set out on the sixth day of January A. D. 1908, has not been amended, changed, modified or repealed and has been ever since its said passage, approval and publication and now is in full force and effect and was in full
6–8 force and effect prior to and at the time of the several acts and offenses of said defendant herein complained of, and was in full force and effect at the time of the bringing of this suit; and

Whereas, said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago, on, to-wit, the twenty fourth day of February A. D. 1908, did sell in the City of Chicago, a standard loaf of bread (which was not sold as stale bread) of the weight of one pound avoirdupois, on which said standard loaf of bread so sold by said defendant, there was not affixed a label at least one inch square or a round label at least one inch in diameter as provided in and by section 2 of said ordinance; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff herein the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00 and, therefore, said plaintiff brings its suit.

* * * * * * *

9 Whereas, said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago, on towit the twenty fourth day of February A. D. 1908, did sell in the City of Chicago a loaf of bread (which was not sold as stale bread) which said loaf of bread so sold by said defendant
10–13 weighed fifteen ounces avoirdupois, and which said loaf of bread had affixed thereon in a conspicuous place a label one inch square upon which label there was printed in plain type, the letters and figures of which were printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type commonly known as 12 point full face square Gothic capital

letters and figures (being substantially such type as is described in Specimen Book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic Title number 82, capital letters and figures, and in the Specimen Book of 1906 of the American Type Founders Company as twelve point lining Gothic number 520 capital letters and figures, or similar type), the weight of said loaf; said letters and figures upon said label being as follows: "15 Ounces", and said label also, had plainly printed thereon the business name and address of the maker of said loaf; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00, that said defendant though requested has not paid to the plaintiff the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00 and, therefore, said plaintiff brings its suit.

* * * * * * *

14–18 Whereas, the said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago, on, to-wit, the twenty fourth day of February A. D. 1908, did sell in the City of Chicago a loaf of bread so sold by said defendant weighed one and one-half pounds avoirdupois, and which said loaf of bread had affixed thereon in a conspicuous place a label one inch square, upon which said label there was printed in plain type the letters and figures of which were printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type commonly known as twelve point full face square Gothic capital letters and figures (being substantially such type as is described in Specimen Book number 9 of Barnhart Brothers & Spindler, as twelve point lining Gothic title number 82, capital letters and figures, and in the specimen book of 1906 of the American Type Founders Company as twelve point lining Gothic number 520, capital letters and figures of similar type), the weight of said loaf; said letters and figures upon said label being as follows "1-½ Pounds" and said label also had plainly printed thereon the business name and address of the maker of said loaf of bread; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff the said sum of $100 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00 and, therefore, said plaintiff brings its suit.

* * * * * * *

19–22 Whereas, said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago, on towit twenty fourth day of February A. D. 1908, did sell in the City of Chicago a loaf of bread (which was not sold as stale bread) which said loaf of bread so sold by said defendant weighed seven pounds avoirdupois, and which said loaf of bread had affixed thereon in a conspicuous place a label one inch square upon which

label there was printed in plain type the letters and figure of which were printed in black ink upon white paper from typ not smaller or making a less conspicuous letter than the type com monly known as twelve point full face square Gothic capital letter and figures (being substantially such type as is described in Speci men Book number 9 of Barnhart Brothers & Spindler, as twelv point Lining Gothic Title number 82, capital letters and figures and in the Specimen Book of 1906 of the American Type Founder Company as twelve point Lining Gothic Number 520, capital letter and figures, or similar type), the weight of said loaf; said letters an figures upon said label being as follows; "7 POUNDS and said label also had plainly printed thereon the business name and address o the maker of said loaf of bread; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00 and therefore, said plaintiff brings its suit.

* * * * * * *

23 Whereas said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago on to-wit, the twenty fourth day of February A. D. 1908, did sell in the City of Chicago, a standard loaf of bread (which was not sold as stale bread) which standard loaf of bread so sold by said defendant weighed one pound avoirdupois, and which said standard loaf of bread had affixed thereon in a conspicuous place a label one
24–27 inch square upon which label there was printed in plain type in black ink upon white paper the business name and address of the maker of said standard loaf of bread, but upon which said label there was *not* printed in plain type the letters and figures of which were printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type commonly known as twelve point full face square Gothic capital letters and figures (being substantially such type as is described in Specimen Book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic title number 82, capital letters and figures, and in the Specimen book of 1906, of the American Type Founders Company as twelve point lining Gothic number 520; capital letters and figures, or similar type), or in any other manner, the weight of said standard loaf of bread and upon which said standard loaf of bread there was no mark of any kind or nature whatsoever showing the weight of said standard loaf of bread, in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to the said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00 and therefore said plaintiff brings its suit.

* * * * * * *

28 Whereas, said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago, on to-wit, the twenty fourth day of February A. D. 1908, did make in the City of Chicago for the purpose of sale in the City of Chicago, a standard loaf of bread of the weight one pound avoirdupois, on which said standard loaf of bread so made by said defendant, there was not affixed a label at least one inch square or a round
29–31 label at least one inch in diameter as provided in and by section 2 of said ordinance; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff herein the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00, and, therefore, said plaintiff brings its suit.

* * * * * * *

32 Whereas, said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago on towit twenty fourth day of February A. D. 1908, did make in the City of Chicago for the purpose of sale in the City of Chicago a loaf of bread which said loaf of bread so made by said defendant weighed fifteen ounces avoirdupois, and which said loaf of bread had affixed thereon in a conspicuous place a label one inch square upon which label there was printed in plain type, the letters and figures of which were printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type
33–36 commonly known as 12 point full face square Gothic capital letters and figures (being substantially such type as is described in Specimen Book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic Title number 82, capital letters and figures, and in the Specimen Book of 1906 of the American Type Founders Company as twelve point Lining Gothic Number 520, capital letters and figures, or similar type) the weight of said loaf; said letters and figures upon said label being as follows; "15 ounces" and said label also had plainly printed thereon the business name and address of the maker of said loaf; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00 and therefore, said plaintiff brings its suit.

* * * * * * *

37 Whereas, said defendant Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago on to-wit, twenty fourth day of February A. D. 1908, did make in the City of Chicago for the purpose of sale in the City of Chicago, a loaf of bread which said loaf of bread so made by said defendant weighed one and one-half pounds avoirdupois, and which said loaf of bread had affixed thereon in a conspicuous place a label one inch square,

upon which said label there was printed in plain type the letters and figures of which were printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type commonly known as twelve point full face square Gothic
38–41 capital letters and figures (being substantially such type as is described in specimen book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic Title number 82, capital letters and figures, and in the Specimen Book of 1906 of the American Type Founders Company as twelve point lining Gothic number 520, capital letters and figures, or similar type), the weight of said loaf; said letters and figures upon said label, being as follows: "1-½ pounds" and said label also had plainly printed thereon the business name and address of the maker of said loaf of bread; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100 and therefore said plaintiff brings its suit.

* * * * * * *

42 Whereas, said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago on towit; the twenty fourth day of February A. D. 1908, did make in the City of Chicago for the purpose of sale in the City of Chicago, a loaf of bread which said loaf of bread so made by said defendant weighed seven pounds avoirdupois, and which said loaf of bread had affixed thereon in a conspicuous place a label one inch square upon which label there was printed in plain type the letters and figures of which were printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type
43–46 commonly known as twelve point full face square Gothic capital letters and figures, (being substantially such type as is described in Specimen Book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic Title number 82, capital letters and figures, and in the Specimen Book of 1906 of the American Type Founders Company as twelve point Lining Gothic number 520, capital letters and figures or similar type), the weight of said loaf; said letters and figures upon said label being as follows "7 pounds" and said label also had plainly printed thereon the business name and address of the maker of said loaf of bread; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00 and therefore, said plaintiff brings its suit.

* * * * * * *

47 Whereas, said defendant, Mathias Schmidinger, being then engaged in the business of a baker in the City of Chicago, on to-wit, the twenty fourth day of February A. D. 1908, did make in the City of Chicago for the purpose of sale in the City of Chicago a standard loaf of bread which standard loaf of bread so made by said defendant weighed one pound avoirdupois, and which said standard loaf of bread had affixed thereon in a conspicuous place a label one inch square upon which label there was printed in plain type in black ink upon white paper the business name and address
48 of the maker of said standard loaf of bread, but, upon which said label there was *not* printed in plain type the letters and figures of which were printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type commonly known as twelve point full face square Gothic Capital letters and figures (being substantially such type as is described in Specimen Book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic Title number 82, capital letters and figures, and in the Specimen book of 1906 of the American Type Founders Company as twelve point Lining Gothic number 520, capital letters and figures or similar type, or in any other manner, the weight of said standard loaf of bread, and upon which said standard loaf of bread there was no mark of any kind or nature whatsoever showing the weight of said standard loaf of bread; in violation of said ordinance and contrary to the provisions thereof, whereby and by force of said ordinance an action has accrued to said plaintiff to demand of said defendant the sum of $100.00; that said defendant though requested has not paid to the plaintiff the said sum of $100.00 or any part thereof, but refused so to do to the damage of said plaintiff in the sum of $100.00, and therefore, said *defendants* brings its suit.

Yet the said defendant being indebted to plaintiff for the several sums of money in the several counts above set out, together amounting to the sum of One thousand dollars ($1,000) though requested so to do, has not paid to the plaintiff said sums of money nor
49 any part thereof, but has hitherto wholly neglected and refused, and still neglects and refuses to pay the same, to the damage of said plaintiff of One thousand dollars ($1,000), and, therefore, plaintiff brings its suit, etc.

(Signed) EDWIN H. CASSELS,
Assistant Corporation Counsel,
Attorney for Plaintiff.
EDWARD J. BRUNDAGE,
Corporation Counsel, Of Counsel.

Gen. No. 283,773. Term No. 17165. In the Circuit Court of Cook County, Illinois. City of Chicago vs. Mathias Schmidinger. Declaration. Copy: Filed March 12, 4037 PM. 1908. Joseph E. Bidwell, Jr., Clerk, by (Signed) Grubbs, Deputy. Edward J. Brundage, Corporation Counsel, Edwin H. Cassels, Ass't Corp. Counsel F-r Plaintiff.

(NOTE.—The allegations and matters directed to be omitted from the last nine counts of the declaration are the same allegations and matters contained in the first count as found on pages 2, 3, 4, 5 and 6.)

50 And afterwards to-wit on the 25th day of May A. D. 1908, a certain Plea was filed in the office of the Clerk of said Court, in words and figures as follows to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

283,773.

CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Debt.

Nil Debet.

And the defendant, Mathias Schmidinger, by Rubens, Fischer & Mosser, his attorneys, comes and defends the wrong and injury, when, etc., and as to the said declaration of the plaintiff, and each and every count thereof, this defendant says that he does not owe the said several sums of money or any or any part thereof, above in said declaration of the plaintiff, and the several counts thereof, in manner and form as the plaintiff has above complained against him in its said declaration, or in any count thereof; and of this the defendant puts himself upon the country, etc.

RUBENS, FISCHER & MOSSER.
Attorneys for Defendant.

And afterwards to-wit on the 27th day of May A. D. 1908, the following proceedings were had and entered of record in said Court to-wit:

General No. 283,773.

CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Debt.

This cause being called for trial and the parties appearing
51 by their attorneys respectively, thereupon, on the stipulation of the parties now presented here in open court it is ordered that said defendant have, and is hereby given leave, to introduce,

here any evidence under the plea of nil debit heretofore filed by him herein which he could introduce under any proper pleas that might have been filed by him in this cause, with leave to said plaintiff likewise to introduce herein, any evidence on behalf of the plaintiff that might be introduced under any proper replications that might have been filed by said defendant in this cause, and thereupon on the agreement of said parties now here in open court, a jury is waived and this cause is submitted to the court for trial without a jury, and the court now here, as well as on behalf of the defendant, and being now fully advised in the premises finds the issues in this cause for the defendant. Whereupon the plaintiff duly excepts to said finding and enters herein its motion for a new trial in said cause. After argument of counsel and due deliberation by the court, said motion for a new trial is overruled and a new trial denied.

Therefore, it is considered by the court that the defendant, Mathias Schmidinger does not owe the said plaintiff the said sums of money in the said plaintiff's declaration in this cause mentioned, nor either, nor any, nor any part thereof, and that said defendant go hence without day.

Thereupon the plaintiff having entered its exceptions herein, prays an appeal from the judgment of this court to the Supreme Court of the State of Illinois, which is allowed upon plaintiff filing herein its bill of exceptions within thirty days from this date.

Enter May 27/1908.

THOMAS G. WINDES, *Judge.*

52 And afterwards, to-wit, on the 25th day of June A. D. 1908, the following proceedings were had and entered of record in said Court to-wit:

283,773.

CITY OF CHICAGO
vs.
MATHIAS SCHMIDINGER.

Debt.

On motion of Edwin M. Cassels attorney for plaintiff in the above entitled cause it is ordered that the time granted to the plaintiff in which to file its Bill of Exceptions herein be and the same is hereby extended ten days.

And afterwards to-wit on the 20th day of May A. D. 1910, a certain Order reversing and remanding was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of December, in the Year of Our Lord One Thousand Nine hundred and Nine, within and for the State of Illinois.

Present: William M. Farmer, Chief Justice; James H. Cartwright, Justice; John P. Hand, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; George A. Cooke, Justice.

William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it Remembered to-wit on the twenty second day of December A. D. 1909, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had and entered of record to-wit:

53 No. 6410.

CITY OF CHICAGO, Appellant,
vs.
MATHIAS SCHMIDINGER, Appellee.

Appeal from Circuit Court of Cook.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matter and things therein assigned for error, and now being sufficiently advised of and concerning the premises are of opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is manifest error.

Therefore it is considered by this court that for that error and also in the record and proceedings aforesaid, the judgment of the Circuit Court in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed and this cause be remanded to the Circuit Court of Cook County for a new trial.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee costs by it in this behalf expended and that it have execution therefor.

I, J. McCan Davis, Clerk of the Supreme Court of the State of Illinois, Do Hereby Certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Testimony whereof, I have set my hand and affixed the seal of the said Supreme Court, at Springfield this 18th day of May in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

J. McCAN DAVIS,
Clerk of the Supreme Court.

54 And afterwards to-wit on the 31st day of May A. D. 1910, the following proceedings were had and entered of record in said Court to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

283,773.

THE CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Order.

On motion of plaintiff, and with the consent of the defendant, both parties appearing in Court.

It is hereby ordered that said cause be redocketed in this Court.

Enter 31 day of May 1910.

THOMAS G. WINDES, *Judge.*

And afterwards to-wit on the 3rd day of June A. D. 1910, the following proceedings were had and entered of record in said court to-wit:

Gen. No. 283,773.

CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Debt.

This cause being called for trial, come the parties by their attorneys respectively.

And thereupon on the stipulation of the parties now presented here in open court, it is ordered that said defendant have and is hereby given leave to introduce here any evidence under the plea of nil debit, heretofore filed by him herein, which he could introduce under any proper pleas that might have been filed by
55 him in this cause with leave to said plaintiff likewise to introduce herein any evidence on behalf of the plaintiff that might be introduced under any proper replications that might have been filed by said plaintiff to any pleas that might have been filed by said defendant in this cause, and thereupon, on the agreement of said parties now here made in open court, this cause is submitted to the court for trial without a jury, and the court now here, after hearing all the evidence adduced, and being fully advised in the premises, finds the issues for the plaintiff, finds the debt to be the

sum of one hundred dollars, and assesses the plaintiff's damages at the sum of one hundred dollars.

Whereupon the defendant duly excepts to said finding and enters herein his motion for a new trial in said cause. After arguments of counsel and due deliberation by the court, said motion for a new trial is overruled and a new trial denied.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant, Mathias Schmidinger, its said debt of one hundred dollars and its said damages of one hundred dollars, in form, as aforesaid, by the court found due and assessed, together with its costs and charges in this behalf expended, and have execution therefor.

It is ordered that upon payment of said damages with interest thereon and costs of suit, said debt be discharged.

Thereupon the defendant having entered his exceptions herein, prays an appeal from the judgement of this court to the Supreme Court of the State of Illinois, and it appearing to the court that the validity of a municipal ordinance is involved in this case and that in the opinion of the court the public interest requires that an appeal shall be taken directly to the said supreme court, the said
56 prayer of the defendant is now allowed upon his filing his appeal bond in the penal sum of two hundred fifty ($250) dollars, to be approved by the clerk of this court, together with his bill of exceptions within thirty days from this date.

And thereupon on the same day, to-wit, on the 3rd day of June A. D. 1910 a certain Stipulation was filed in the office of the clerk of said court in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. —.

CITY OF CHICAGO
vs.
MATHIAS SCHMIDINGER.

It is hereby stipulated and agreed by and between the parties hereto that the original bill of exceptions in lieu of a copy thereof may be incorporated in the transcript of record of said cause to be filed in the Supreme Court of the State of Illinois.

EDWARD J. BRUNDAGE,
Corporation Counsel.
EDWIN H. CASSELS,
Attorneys for Appellee.
RUBENS, FISCHER, MOSSER & RIGBY,
Attorneys for Appellant.

And thereupon on the same day to-wit on the 3rd day of June A. D. 1910 a certain Bill of exceptions was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

57 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

General Number —.

CITY OF CHICAGO
vs.
MATHIAS SCHMIDINGER.

* * * * * * *

57 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. 283,772.

CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Bill of Exceptions.

Be it remembered that heretofore, to-wit: on June 3rd 1910, being one of the days of the May term of said Circuit Court for the year 1910, the above entitled cause came on for trial before the Honorable Thomas G. Windes, one of the judges of said circuit court, upon the pleadings heretofore filed herein.

Appearances:

Mr. Edward J. Brundage, Corporation Counsel.
Mr. Edwin H. Cassels, Representing Plaintiff.
Mr. Harry Rubens and Mr. B. F. Ninde of Messrs. Rubens, Fischer, Mosser & Rigby, Representing Defendant.

Filed Jun. 3, 10-06 A. M., 1910.

JOSEPH E. BIDWELL, *Clerk,*
Per REID, *Deputy.*

58 Whereupon the following stipulation, duly signed by both parties, was duly filed.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

283,772.

CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys that the defendant shall be and he is hereby permitted to introduce any and all evidence and prove any and all facts under the general plea of "Nil Debet" filed herein, which could legally and properly be introduced and proved under all other general and special pleas if made and filed herein to said declaration, and to each and every count thereof provided, however the introduction of said evidence and every part thereof shall be subject to all objections as to relevancy, competency and materiality made and interposed by the plaintiff.

Dated at Chicago Illinois this 25 day of May A. D. 1908.

EDWIN H. CASSELS,
Attorney for Plaintiff.
RUBENS, FISCHER & MOSSER,
Attorneys for Defendant.

Whereupon the following stipulation duly signed by both parties was duly filed.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

59 Gen. No. 283,773.

CITY OF CHICAGO, a Municipal Corporation,
vs.
MATHIAS SCHMIDINGER.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys that for the purposes of the trial of said cause, and for that purpose only, the following facts shall be considered as true, and may be so taken and considered by the court, subject, nevertheless, to all of the ob-

jections on the ground of incompetency, irrelevancy or immateriality, or any other grounds whatsoever on which proof of such facts could have been objected to by either party to said cause, had proof thereof been regularly made or offered to be made before the court by the other, by proper evidence, it being the intention hereof merely to relieve each party hereto from the necessity of offering evidence in court on the following facts, that is to say:

(1) The plaintiff, the City of Chicago, is a municipal corporation duly incorporated under the general laws of the State of Illinois.

(2) The City Council of the said City of Chicago did, upon the 6th day of January A. D. 1908, duly pass an ordinance entitled "An ordinance regulating the sale and prescribing the weight and quality of bread in the loaf, sold or offered for sale within the City of Chicago, which said ordinance was thereafter duly approved and signed by His Honor the Mayor of said City of Chicago, and was upon the 9th day of January A. D. 1908, duly published in the manner provided by law in the "Proceedings of the City Council" a publication published by authority of the City Council of said City of Chicago.

60 (3.) That said ordinance so passed by the said City Council of the said City of Chicago, is in the words and figures as set out and contained in the declaration filed herein, and in each and every count thereof.

(4) That said ordinance so passed by said City Council on the said 6th day of January A. D. 1908, has not been amended, changed, modified or repealed since its passage by said City Council.

(5) That the defendant, Mathias Schmidinger was engaged in the business of a baker in the said City of Chicago on to-wit the 24th day of February A. D. 1908, as alleged in the declaration filed herein, and in each and every count thereof, and that the said defendant did then and there make, procure for the purposes of sale, sell, offer and expose for sale said several loaves of bread, in the manner and form and as described in said declaration, and respectively in each and every count thereof.

Dated at Chicago, Illinois, this 25th day of May A. D. 1908.

EDWIN H. CASSELS,
Attorney for Plaintiff.
RUBENS, FISCHER, MOSSER & RIGBY, *Attorneys for Defendant.*

And thereupon the plaintiff, to maintain the issues on its part, introduced the following testimony that is to say:

Mr. CASSELS: I make a formal tender of the ordinance and I think our stipulation admits its passage and publication. I offer a certified copy of the ordinance in evidence.

Mr. RUBENS: And I object to the introduction of this ordinance and my objections are these, your Honor. I object to the
61-63 introduction of the ordinance because those sections of the ordinance which are material and applicable to the facts

pleaded are in violation of sections 1 and 2 of article 11 of the Constitution of the State of Illinois.

I also object to the introduction of the ordinance in evidence because the sections of the ordinance applicable to the facts pleaded in this case are in violation of section 1 of the 14th amendment to the constitution of the United States, which said section is as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The COURT: My custom, in the trial of this kind of cases is to receive all evidence that is offered, subject to objection, unless it is clearly wrong. I am supposed to decide it on competent evidence. It will be received subject to your objection.

To which ruling both parties expressly assented. Said ordinance so offered and received in evidence subject to objection, is in words and figures as follows to-wit:

* * * * * * *

64 And thereupon the plaintiff rested its case.

Whereupon the defendant to maintain the issues on his part, introduced in evidence the following testimony, that is to say:

SAMUEL E. LOVELESS called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RUBENS:

Q. Will you please give us your full name?
A. Samuel E. Loveless.

The COURT:

(Q.) How do you spell your last name?
A. L o v e l e s s.

Mr. RUBENS:

Q. Where do you live, Mr. Loveless?
A. Morgan, Park, a suburb of Chicago.
Q. Are you engaged in business in the City of Chicago?
A. Yes sir.
Q. In what business are you engaged in the City of Chicago?

65 A. Manufacturing of bread.

Q. For what length of time have you been engaged in the manufacture of bread in the City of Chicago?
A. 8 or 9 years.

Q. What is the firm name, or the name of the corporation which carries on the business in which you are interested?

Mr. CASSELS: If your Honor please, I object to this question or any line of questioning that has to do with the firm with which this witness is engaged.

The COURT: I don't see any necessity of it but I will allow it subject to the objection.

Mr. RUBENS:

Q. State the name of the firm.

A. Schulze Baking Company.

The COURT: I will endeavor to decide it on the competent evidence. I think we will gain time.

Mr. RUBENS: We will gain very much time, Your Honor, and it is unquestionably material, because it goes to show the conditions surrounding this trade.

Q. What is your position in that corporation?

A. Secretary.

Q. Are you familiar with the operations of that corporation with reference to the manufacture of bread and the selling thereof?

A. I am.

Q. What is the average daily output of loaf bread of the Schulze Company in the City of Chicago about?

A. Of course, these are trade secrets. It is over 50,000 loaves.

Q. Over 50,000 loaves a day?

A. Yes.

Q. The manufacture of bread as carried on by your corporation is done by machinery and in a big way? is it?

A. Yes sir.

66 Q. How many similar concerns are there in the City of Chicago manufacturing bread for sale in the City of Chicago in a large way, by machinery, and having outputs say of over 5,000 loaves a day about?

A. I suppose over 5000 would be ten to fifteen.

Q. How many bakers are there in the City of Chicago in round numbers selling loaf bread in the City?

A. Between eight hundred and a thousand.

Q. Is there any loaf bread made in the City of Chicago by people other than professional bakers?

A. Yes.

Q. Or people engaged in the manufacture of bread?

A. There is.

Q. By whom?

A. By the housewives.

Q. By the housewives? Are there no other people in the City of Chicago who are manufacturing and selling loaf bread—now I am going to lead the witness a little bit to save the time,—that is the only reason I do it—such as hotels and restaurants?

A. They bake their own bread for their own use.

Q. I will ask you whether you know if the ordinary cook stove

in use in families is a suitable contrivance for the purpose of baking wholesome loaf bread?

A. I think so.

Q. It is?

A. Yes sir.

Q. Tell me whether your concern and the other large concerns in the City of Chicago confine their sales to a particular part of the city or whether these concerns sell all over the city or in various parts of it, and outside of it, and are in competition with each other?

A. Our concern sells pretty near all over the city of Chicago, and from what I know other concerns do the same thing, other corporations.

Q. As well as smaller bakers?

A. Yes sir.

Q. In other words, you sell in the same sections of the city in which there are small bakeries, you sell in the sections of the city
67 in which the housewives make bread and other bakers sell and housewives make bread in the same locality where your bakery is located?

A. Yes.

Q. Will you please state to the Court in a short way the process of making bread from the time, say—let's get right down, from the time that the dough is made what happens then, when the dough is made?

A. After the dough is made?

Q. Yes.

A. The dough is made and goes through a certain stage of fermentation, a process of fermentation.

Q. Is that before the dough is scaled off, as it is called, or after it is scaled off?

A. Well, after it is scaled off it goes through a certain stage of fermentation.

Q. Then I understand you to say when the dough is made it is scaled off, it is divided according to sizes, the sizes that you want to make?

A. Yes.

Q. And then you allow that dough, divided off in the way indicated to go through a process of fermentation, how long does that process of fermentation take?

A. The dough is placed in pans and is put in proof boxes, what is called proof boxes and it all depends upon the kind of bread as to how long the fermentation takes place after that, and from there it is taken to the oven, being baked in the oven possibly half an hour.

Q. Now, wait a minute; we have got the dough scaled off, and we have got it undergoing the process of fermentation. How long does that usually take, say in ordinary white bread, how long on an average does it take that fermentation process?

A. From the time the dough is——

Q. Scaled off, as it is called?

A. I believe that there would be other witnesses who could tell that story better than I could.

—. Then after the dough has gone through that fermentation for the period that you don't care to testify about, prefer others to testify about, then it goes into the oven?

68 A. Yes.

Q. Do you know what the oven is that is used by the bakers in the City of Chicago?

A. In this city it is what is known as the Peel oven, is what is most generally in use.

Q. The Peel oven.

A. The Peel.

Q. There are such ovens as are called draw-plate ovens, are there not?

A. Yes.

Q. And there are other ovens which are called reel ovens?

A. Yes.

Q. But the draw-plate ovens and the reel ovens are not such ovens — are in general use among the bakers?

A. Not in general use in this city.

Q. In your large bread factory what kind of an oven do you use?

A. We use mostly the Peel oven.

Q. Now, the Peel oven, as I understand it and you will probably let it in, because it will save time.

Mr. CASSELS: All of this is all in to save time.

Mr. RUBENS (continuing the question): —is an oven through which the bread is put exclusively through one opening or aperture, isn't it?

A. Yes.

Q. And then the oven is heated before the first dough goes in there?

A. What is that?

Q. Before the first dough goes in there the oven is heated?

A. Yes.

Q. Then you put in one piece of dough, scaled off, into the oven and then after the oven is filled you wait a certain time and then you take it out through that same aperture? don't you?

A. Yes.

Q. Isn't it a fact that some of the bread which is in that in the shape of dough would necessarily have to be in the oven a longer time than other bread?

A. Quite so, yes.

Q. The bread that is taken in first is in fact taken out last isn't it?

A. Yes.

69 Q. And consequently that dough stays in there longer and bakes longer?

A. Yes sir.

Q. Has that any effect upon the weight of the bread?

A. The bread that is in the oven longer weighs less than the bread that is taken out sooner. The longer the bread is in the oven the less it weighs.

Q. In other words, let's get that clear before his Honor's mind;

If I take two pieces of dough of the same weight exactly, made out of the same flour and the same other material, and containing the same ingredients, the one that goes in first and stays in longest will when it comes out weigh less than the one that went in last and came out first?

A. Yes.

Q. Because being exposed to the heat longer there is more of an evaporation?

A. It goes by evaporation.

Q. I will ask you, Mr. Loveless, whether the change in the weight of bread takes place after it leaves the oven?

A. Yes sir.

Q. What is that caused by?

A. Evaporation and conditions, various conditions, the atmosphere, one day bread dries out more than another day.

Q. Why?

A. It all depends upon atmospheric conditions.

Q. Do you mean to say that when I have a loaf of bread of say exactly one pound when it leaves the oven that on a dry day that loaf of bread will shrink in weight quicker than on a rainy day?

A. Yes sir.

Q. Is there any difference with reference to the shrinkage in the weight of bread with reference to the place and manner of keeping the bread after it is baked?

A. Yes sir, if a loaf of bread is kept on a grocer's counter, it would dry out faster than if kept in what is called a bread case, a glass bread case.

70 Q. Suppose loaf bread should be exposed in a show window, and that show window should be exposed to the rays of the sun would there be a greater loss of weight than if the bread were kept in a dark place somewhere in the grocery store, in a dark, dry place?

A. Much greater.

Q. If the bread were kept in a moist place would the shrinkage be less than if the bread were kept in a dark and dry place?

A. Yes.

Q. Is there any rule as to the time, any rule or custom in the bakery trade in the City of Chicago as to the length of time that has to elapse before bread is commonly called stale bread. I ask this question because of the ordinance. In other words, the provisions of the ordinance do not apply to loaf bread that is commonly called stale bread.

Mr. CASSELS: And sold as such.

Mr. RUBENS: And sold as such.

A. There is no specified time.

Q. Is there any unanimity of opinion among bakers as to when bread is stale, or among people, that you know of?

A. Necessary difference of opinion.

Q. Let me ask you whether the question of the loss of weight after bread has been baked is not dependent also on the quality of bread in a measure?

A. Yes sir.

Q. In other words, bread made in one way will shrink after it leaves the oven quicker than bread that is made in another way?

A. Yes sir.

Q. I will ask you whether as a matter of fact there is not a difference in the shrinkage in weight after the loaf has been baked, depending upon the size of the loaf?

A. Yes sir.

Q. In what way?

A. Large loaf shrinks less than a small loaf; where the surface of the large loaf is much greater and the body is much greater it holds the moisture much better than a small loaf.

Q. I will ask you whether the fact that bread has been baked so as to have a very thick and heavy crust, whether that makes
71 any difference in the shrinkage of the loaf bread after it leaves the oven?

A. Makes any difference in the shrinkage?

Q. Yes.

A. The heavy crust shows that the bread has been well baked.

Q. Well, is there as much chance for evaporation through a heavy crust as there is through a thin crust?

A. I could not answer that.

Q. You don't know that. I will ask you, Mr. Loveless whether there is any difference in the cost of bread to the manufacturer?

A. Yes sir.

Q. According to the material which is put into the bread?

A. Certainly, yes sir.

Q. What kind of loaf breads are there made in the City of Chicago with reference to the quality and the ingredients?

Mr. RUBENS: Shall I lead the witness to save time?

Mr. CASSELS: Any way.

Mr. RUBENS: Or let him go on.

Q. Isn't it a fact that there is a lot of bread made and sold in the City of Chicago which is merely composed of flour, yeast and water?

A. Yes sir, that is called cheap bread.

Q. Isn't it a fact that there is a lot of bread made and sold in the City of Chicago, loaf bread, which is composed of rye flour, instead of wheat flour?

A. Yes sir.

Q. Isn't it a fact that there is a lot of bread sold in the ordinary course of business in the City of Chicago which in addition to having flour of some kind and yeast of some kind has also an addition of butter?

A. Yes.

Q. Or of lard?

A. Yes.

Q. Or of sugar?

A. Yes.

Q. In other words, do I understand you to say that there
72 is no such thing in the City of Chicago as one kind of loaf bread in reference to quality; is that true?

A. That is very true.

Q. But there are all sorts of qualities of bread?

A. Yes sir.

Q. Now with reference to the sizes and shapes of loaf bread sold in the City of Chicago is there any common form of bread in which it is sold?

A. All kinds of sizes and shapes.

Q. I will ask you whether your large factory makes different sizes of bread?

A. Yes sir.

Q. Have you seen sold in the City of Chicago loaf bread of this description. Do you know whether any such is for sale?

A. Our company does not sell that.

Q. I know your company does not sell that; do you know whether that is for sale ordinarily in the City of Chicago, or do you prefer the man who bought this loaf of bread I hold in my hands to say that?

A. I would yes.

Q. Do you know whether bread of this shape (Exhibit C) is ordinarily sold in the City of Chicago?

The COURT: Hold it up.

Mr. RUBENS: How is that?

The COURT: I just wanted to see.

Mr. RUBENS: I offer all these loaves in evidence and for the benefit of counsel and the Court I will present to the Court photographs which will be embodied in the record and marked exhibits A, B, C, D, E, F, G, H, I, J, K, L, and M.

Photographs of which said exhibits are as follows:

(Here follows photograph marked p. 73.)

Exhibit A.
Exhibit E.
Exhibit B.
Exhibit F.
Exhibit C.
Exhibit G.
Exhibit D.
Exhibit H.

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74 Mr. RUBENS: Well I will ask you Mr. Loveless what percentage of the loaf bread sold in the City of Chicago is sold and has been sold to the consumer for many years at a price of five cents a loaf, or multiples thereof?

A. I believe, from my general observation——

Mr. RUBENS:

Q. And your experience as a baker.

A. —it must be at least 95 percent.

Q. Of the bread that in the City of Chicago is sold to the consumer?

A. Yes.

Q. Of bread costing five cents or multiples thereof?

A. Yes sir.

Q. I will ask you, Mr. Loveless, what in your experience have been the fluctuations in the cost of materials that enter into the manufacture of loaf bread in the City of Chicago?

A. In a general way or different items?

Q. Well, say in the last five years in reference to wheat flour?

A. Suppose we take seven years.

Q. Take seven years?

A. I have seen good flour sell at $3.50 a barrel, and I have seen it sell at $6.50 a barrel.

Q. Do you know what the price of flour to the baker, of ordinary good flour, such as is commonly used by good bakers in the City of Chicago cost at the time when this ordinance was enacted; that was January 6, 1908.

A. $5.10.

Q. Will you tell me how much a loaf the difference in cost to the baker will be if the price of flour to the baker rises from $3.50 to $6. or $6.50 a barrel; did you figure that out?

A. An advance of three dollars.

Q. Say an advance of three dollars?

A. On every 25 cents advance there is an increase of 8½ cents, 100 loaves.

Q. That is almost half a cent a loaf?

A. That is 34 cents on every dollar; three times that would be $1.02, on 100 loaves.

Q. 100 loaves?

A. Yes.

75 Q. In other words, the difference between a low priced flour and a high priced flour would make a difference in a low priced loaf——

A. Of over a cent.

Q. —of over a cent?

A. Yes; that from 25 cents would be 8½ cents on every hundred loaves.

Q. Are there any fluctuations with reference to the other materials that enter into the measure of bread, such as lard, butter, etc.?

A. Yes sir.

Q. Will you give us some of those fluctuations within the last 5 or 7 years?

A. Comparing 1906; I would take milk 50 percent; lard 33-1/3 percent.

Q. Increase you mean?

A. Yes.

Q. As between what years?

A. Between 1906 and 1908.

Q. Between 1906 and 1908?

A. Yes.

Q. In the matter of flour it is an increase of how many percent?

A. It is an increase—that is the year we had the cheap flour, about 50 percent.

Q. 50 percent?

A. Yes.

Q. In the matter of lard?

A. Lard, 23-1/3 percent, as I have stated.

Q. Any other matters?

A. In other things, eggs; this was figures a certain time about 16 percent.

Q. In the matter of eggs it is 16 percent?

A. Yes, and horse feed and things of that kind; that goes into the expense.

Q. Now are there fluctuations in the matter of other expenses that are incurred by the baker in the manufacture of loaf bread in the city of Chicago?

A. Yes sir.

Q. What are they?

A. The item of horse feed has been very great. Then corn 32 percent. It is more than that at the present time. Hay is an average of 25 percent higher. Bran 70 percent higher; oats 70 percent higher.

Q. How many horses has your company employed in the prosecution of its business?

A. I believe it has 175.

76 Q. Other large bakeries have——

A. Proportionate——

Q. —a proportionate amount?

A. Yes sir.

Q. It is customary, is'nt it, for you to deliver the bread to the retailer?

A. To the grocer.

Q. That is the retailer?

A. Yes.

Q. And you say 90 percent of the loaf bread that is sold in the City of Chicago to the consumer is sold in this way, that you sell it to the retailer and the retailer sells it to the consumer.

A. I did'nt catch the question.

Q. I mean, what is the percentage of the loaf bread that is sold in the City of Chicago to the consumer, that is sold, not that is made by the housewives or that is made by the restaurants, but the loaf

bread of all kinds that is sold by the bakers in the City of Chicago, the percentage that is sold in this way; that the baker sells it to the grocer or other retailer and he sells it to the consumer?

A. We have some small bakeries who deal pretty direct to the family trade; but it would be safe in saying that 75 percent of the bread that is sold in Chicago——

Q. Of the loaf bread?

A. Of the loaf bread that is sold in Chicago is sold through the dealer.

Q. How do you adjust the fluctuations in the cost of raw material?

A. In the weight of the loaf.

Q. In the weight of the loaf?

A. Yes.

Q. Do I understand you to say it is the custom and has been the custom of the bakery trade in the City of Chicago that when the cost of material rises that the size of the loaf shrinks?

A. Yes.

Q. And that when the cost of the material decreases the size of the loaf increases?

A. Yes sir.

Q. Why do you increase it when the cost of the material becomes very low?

A. Competition regulates that.

77 Q. Is there keen competition in the bread business in the City of Chicago?

A. Yes sir.

Q. Has anybody a monopoly of the bread business in the City of Chicago the loaf bread business?

A. No sir.

Q. Was I right when I heard you say that there are between 800 and 1000 bakers, professional bakers, in the City of Chicago engaged in that business?

A. Between 800 and a thousand.

Q. Now you testified that the ordinary housewife is a competitor of the baker of loaf bread; that is, she can and does bake bread?

A. Yes sir.

Q. That competition between the baker who carries on the business of a baker and the housewife who makes the loaf bread or has it made in her home, does that competition vary at different times in the year?

A. Yes sir.

Q. When is that competition keenest?

A. Between the housewife?

A. Yes.

A. In the winter time.

Q. Why?

A. Because she has her cook stove burning and makes her bread and we lose the sale of it.

Q. Now in your manufactory, Mr. Loveless, what by experience is the decrease in your sales under the same circumstances merely

caused by the increased making of loaf bread by housewives in the winter; did you investigate that?

A. Yes sir, we are safe on figuring on about 16-2/3 percent.

Q. 16-2/3 percent is your experience?

A. About one sixth, yes.

Q. That is the experience in your manufactory?

A. In our own business.

Q. In your own business.

A. Yes.

Q. I will ask you, Mr. Loveless, whether you know that breads other than loaf bread are sold in the City of Chicago, such as biscuits, crackers, and the like?

A. Yes.

Q. Are they only such as are made in the City of Chicago or do they come from different parts of the United States, in
78 competition with the bakers here?

A. There is some shipped in, some bread and crackers both.

Q. Some in a very large way?

A. Yes.

Q. Thousands and thousands and thousands of packages, aren't there?

A. Yes sir.

Q. Such as by the National Biscuit Company for example?

A. Yes.

Q. Stale bread is sold, isn't it, in the City of Chicago?

A. Yes.

Q. It is sold at a lower price?

A. Yes.

Q. But it is an article of merchandise the same as the other bread?

A. Yes.

Q. Only in very much smaller quantities.

A. Yes.

Q. Is'nt it a fact that some people prefer stale bread to other bread.

A. Yes sir.

Q. If I understood you right you said that there is no rule as to when bread is considered generally, commonly, as fresh bread or as stale bread?

A. No set rule.

Q. It depends to some extent upon the particular taste or opinion of the purchaser?

A. Yes sir.

Q. Stale bread is usually sold to the consumers at two loaves for five cents isn't it?

A. Yes, and less.

Q. What is that?

A. And less.

Q. At that price and less?

A. Yes.

Q. When I speak of stale bread I mean stale loaf bread; that is what I mean.

A. That is what I mean.

Cross-examination.

By Mr. CASSELS:

Q. Just one question, if your Honor please. I want to ask the witness when he considers bread stale?

A. When it is hard and dry.

Mr. RUBENS: Which kind of bread: any kind of bread or any particular kind of bread?

79 Mr. CASSELS: No, of loaf bread, or such as you said constitutes 90 percent I think of the sales.

Mr. RUBENS: No, he only meant that as to price, not as to quality. There are all kinds.

Mr. CASSELS: The ordinary loaf bread.

Mr. RUBENS: Of which size, 5 cent size or 10 cent size.

Mr. CASSELS: Suppose we take the 5 cent size.

A. When it is stale?

Q. When would you consider it stale?

A. You would have to tell that by the appearance and feeling of it, when it is hard and dry.

Q. Ordinarily how long would it take in which bread would become hard and dry?

A. All depends on conditions.

Q. Suppose it is kept in the ordinary bread cases in which grocers keep it?

A. That would all depend upon the quality of the bread.

Q. Take the quality that the Schulze Baking Company makes——

Mr. RUBENS: There is none of theirs. It is coming here. It will be here in a minute. That is why I didn't ask him.

Mr. CASSELS:

Q. What kind of loaf bread does your company sell the most of; what is the most popular brand that you have?

A. Butternut.

Q. Butternut. How long does it take butter nut bread to become stale if kept in the ordinary bread case of the average grocery?

A. That depends upon the kind of a day it is.

Q. Take a day like today.

A. For instance a loaf of bread is delivered this morning to the retail trade trade day after to-morrow that bread might become unsalable to certain people.

Q. It certainly would become stale?

A. By day after tomorrow.

—. ——.

A. It might to some people.

Mr. CASSELS: That is all.

80 Redirect examination.

By Mr. RUBENS:

Q. Can you testify what profit or loss you would have under the present method of selling bread in the City of Chicago and the

cost of material on a 5 cent loaf if it were scaled to one pound when it leaves the oven?

A. On today's market?

Q. On today's market?

A. I have figured out very conservatively that on today's markets we would lose 34 cents on every hundred loaves of bread that we sold.

Q. How do you help yourself in that condition?

A. Decrease the weight and still sell at five cents.

Mr. RUBENS: That is all.

Recross-examination by Mr. CASSELS:

Q. Has there been any change in the prices of material, Mr. Loveless, since the passage of this ordinance?

A. The fluctuation has been very slight. I looked up the flour this morning; I have made a statement before of the same thing, and the price of flour today happens to be about the same thing it was at that time.

Q. Have there been any fluctuations from December 1906?

A. 1906?

Q. 1907, I mean?

A. As I say, I looked it up this morning and the markets were just about the same as they were at that time so I brought the same statement in.

Q. The price of flour is about the same?

A. Practically the same.

Mr. RUBENS:

Q. There has been substantially no fluctuation between the passage of this ordinance, which was four months ago?

A. I wish to say it has been higher, but today it is not.

Mr. CASSELS:

Q. It has been higher between the passage of the ordinance and today?

A. Yes sir.

81 A. I believe one time we decreased the weight.

Q. When?

A. I can't tell you when.

Q. How much did you decrease it?

A. Decrease it?

Q. Decrease it?

A. Yes.

Q. How much?

A. I believe it is an ounce.

Q. How much did the price of flour increase?

A. Since——

Q. You decreased it an ounce, upon what data did you base that decrease in the weight of a 5 cent loaf?

A. That was based on the market.

Q. How much of an increase in the price of flour was there to justify this one ounce decrease in the weight of the loaf?

A. I don't remember; I could not testify as to just how high that has been since that time.

Q. But you are sure you decreased the size of the loaf?

A. Yes, that is very vivid in my mind, but I can look it up later.

Q. How much of a fluctuation do you take notice of in reference to increasing and decreasing the size of the loaf, that is, do you decrease it or increase it at every change in the price of materials?

A. No sir.

Q. How much of an increase or decrease do you take notice of?

A. Half a dollar would cause us to.

Q. Half a dollar?

A. Yes.

Q. In the price of flour?

A. Yes.

Q. Half a dollar one hundred weight?

A. I think that every ounce means the difference of 35 cents on a barrel of flour.

Q. That is a calculation?

A. Yes.

Q. You say that every time the price of a barrel of flour increased or decreased 50 cents you increased or decreased the sizes of the loaves; is that it?

A. Yes.

82 Q. I want to get at the rule.

A. There is no set rule.

Q. That is the rule; in other words, when you think flour is pretty high you decrease the loaf?

A. When we have to, when our books commence to show the other way.

Q. You are selling the same weight loaf now that you were selling in January or slightly before that time, December 1907?

Mr. RUBENS: Of what kind of bread?

Mr. CASSELS: 5 cents.

Mr. RUBENS: What kind?

Mr. CASSELS: Take the Butternut bread.

A. I don't remember the weights at that time.

Q. Are you selling the same weight now that you were then?

A. I don't remember just exactly what our weights were then.

Q. The price of flour has not changed?

A. I say I looked up the flour market, but I didn't look up the weight between that time and this.

Q. Mus-n't it necessarily follow that you were selling the same weight now that you were then if you base the weight upon the price of materials?

A. I can look it up.

Q. Must that not necessarily follow?

A. Not necessarily.

Q. In other words, you have no fixed or definite rule at all for fixing the weight of a 5 cent loaf of bread?
A. In my opinion I believe that we are scaling the bread the same today as we did then, but I am not sure.
The COURT: What is the idea of a 5 cent loaf?
Mr. RUBENS: When it leaves the oven, he means, or when?
A. When it is baked.

The COURT:

Q. When it leaves the oven?
A. We figure that it shrinks two ounces. Our bread today weights about 14 ounces.

Mr. RUBENS:

Q. When it leaves the oven?
A. After it is baked.

Mr. CASSELS:

Q. You mean in your shop?
A. Yes sir.
83 Q. How much would it weigh when the grocer gets it; you deliver the same day, do you?
A. Yes, there is a slight shrinkage there.
Q. How much would that shrinkage be?
A. I could not tell you.

Mr. RUBENS: We will give you exactly; a witness has made tests. This witness does not know that.

Mr. CASSELS:

Q. How much does Butternut bread scale today, or within the last 2 or 3 weeks?
A. Aim to have it weigh 14 ounces.
Q. 14 ounces?
A. When it reaches the trade.

Mr. CASSELS: That is all.

ROBERT J. BREMNER. called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. RUBENS:

Q. What is your full name?
A. Robert J. Bremner.
Q. What is your business?
A. Bakery business.
Q. Are you engaged in the bakery business in the City of Chicago?
A. Yes sir.
Q. Engaged in it now?
A. Yes sir.
Q. For what length of time have you been engaged in the bakery business?

A. Since 1881.
Q. In the City of Chicago?
A. Yes sir.
Q. A period of 28 years?
A. Yes sir.
Q. 27 years. What is the output of your bakery per day in the City of Chicago?
A. About 14,000 loaves.
Q. About 14,000 loaves of bread on an average?
A. Yes.

Mr. RUBENS:

Q. Where do you sell your bread, within the limits of the City of Chicago?
A. Sell it all over, the grocery stores mostly.
Q. I mean, in all parts of the city, mostly all parts of the City.
84 A. As far north as the limits, as far south as 47th, as far west as the limits.
Q. Are there any other bakers and bread manufacturers selling bread within the same territory within which you are selling it?
A. Yes.
Q. Are there any other people within the same territory who are making loaf bread?
A. Yes sir.
Q. Who are they?
A. Well, they are rather numerous; I could not mention them all.
Q. I mean, a large number of bakers?
A. Very, very large number.
Q. What, according to your best judgment, is the number of bakers in competition with you in the City of Chicago?
A. About 800.
Q. Are there persons other than bakers that are manufacturing loaf bread within the territory in which you sell your loaf bread?
A. Yes.
Q. Who are they?
A. Why, some grocers and some restaurant keepers.
Q. Are there any private families that make their own loaf bread?
A. Yes, also private families.
Q. Is that making of loaf bread in the kitchens of the private families in the ordinary family cook stove an element of competition in your business?
A. Yes, it is.
Q. Is it more of an element of competition in the summer time than in the winter time, or vice versa?
A. More in the winter time than in the summer time.
Q. What amount of loss in your experience do you attribute to the great baking of loaf bread in the winter time than in the summer time?
A. About 16 per cent.
85 Q. Is that your experience as a baker having been doing business in Chicago during 27 years?

A. That is my experience while conducting my own business on Clybourn avenue the last four and a half years.

Q. Wasn't it your general observation before that time?

A. My general observation before that time was the same.

Q. But you have watched it more carefully since that time?

A. I have had the records since that time.

Q. You have had the records, that is, actual records?

A. Yes sir.

The COURT: That is, 16 per cent of loss in your profits?

A. No. 16 per cent of our ordinary summer output reduces 16 per cent in the winter time.

Mr. RUBENS:

Q. Mr. Bremner, as a practical baker, having been in that business for 6 years, I will ask you how bread is scaled off, the dough is scaled off, before it goes into the oven?

A. There are two ways of scaling it off; some scale off by hand and others by dough divider.

The COURT: By What?

A. Dough divider.

Mr. RUBENS: A Dough divider, a machine. Which is customary among the bakers of Chicago?

A. The most customary is the old hand scale.

Q. I will ask you, from your experience as a practical baker whether it is possible to exactly scale off dough all the time?

A. No, it is not.

Q. Will you explain to the court why it is not.

A. By hand or by machine?

Q. By hand?

A. Well, in the first place, when they start to scale off with a small scale machine you may say it is clinging, and it ain't very long before the bearings of that scale become clogged with the flour floating around in the surface of the room, and also the flour adheres to the top of the scale. It has to be cleaned off and
86 wiped off from time to time. In the meantime, of course, there is a variation in the weight. There is also a variation caused by the man that does the scaling himself. He has a large quantity to go through. He must scale quickly, and as he progresses in his work he becomes probably tired or nervous and he throws on weight a little quicker and it will start down, the valve will open and throw it off, so that will make a variation in the weight.

Q. As a matter of fact it has not been found possible to scale off by means of the hand scale exactly?

A. No sir never has.

Q. That is your experience as a practical baker?

A. Yes.

Q. How many of the bakers of Chicago, to your knowledge, have what are called dough dividing machines?

A. I think probably a half a dozen.

Q. Out of the 800?

A. Yes.

Q. Do you know something of the variation of a dough dividing machine?

A. I do.

Q. Have you one yourself?

A. I have.

Q. That dough dividing machine has been considered or is considered by the trade an improvement upon the hand scale?

A. Yes.

Q. Now, I will ask you whether from your experience a dough dividing machine will scale off the bread exactly?

A. It will vary.

Q. It will vary?

A. Yes.

Q. Why?

A. Because of the different natures of the dough and also the different amount of pressure that is in the machine caused by the weight of the dough itself; in other words, when the machine is filled up, it holds, say about 50 or 55 pounds of dough the bread will incline to weigh a trifle more. When the machine gets
87 down to the empty point it will be less, because there is less pressure upon the dough.

Q. What is the bake oven commonly in use by the bakers of the City of Chicago?

A. Peel oven.

Q. To what extent are draw plates or reel ovens in use by the bakers of the City of Chicago?

A. Very slightly.

Q. According to your knowledge how many draw-plate ovens are there in existence?

A. In Chicago?

A. In Chicago.

A. In use I should say about 4, possibly.

Q. About four ovens among the 800 bakers?

A. Yes, and about two reels.

Q. And about two reels among the 800 bakers?

A. Yes.

Q. A draw-plate oven, as I understand it, differs from a Peel oven in this; that in a draw-plate oven you put the dough upon the plate and then put the whole thing into the oven simultaneously?

A. Yes.

Q. And after it is baked you pull it out simultaneously?

A. That is right.

Q. And in the reel oven the dough is attached to a reel wheel as it is called, which rotates and exposes the bread in that way?

A. Yes.

Q. Those are comparatively new inventions?

A. The reel is not.

Q. The reel is not. That is old and has not been found very satisfactory?

A. Has not been found very satisfactory.

Q. The draw-plate is a new thing?
A. Yes.
Q. There are only how many, four or six in use in Chicago?
A. Yes.
Q. Among the 800 bakers?
A. Yes.
Q. I will ask you whether this statement which I will read to you is correct or not.

Mr. RUBENS: The reason I read it your Honor is because it saves time.

88 Mr. CASSELS: What is it from.

Mr. RUBENS: It is from an article protesting against the British bread law, published in the 23rd volume of the Law Journal in 1888. It contains a concise statement of what happens in the oven and I want to ask him whether that is true.

The COURT: What is the page?

Mr. RUBENS: 23 Law Journal, page 467. (Counsel thereupon read as follows, to-wit: "after careful sealing off is done the loaves will not all come out of the oven the same weight. It takes some ten or fifteen minutes to fill the oven and nearly the same time to empty it, and as the oven can have but one door, the loaves that go in first are taken out last; these having an hour's more baking will necessarily be lighter than the others. Again one side of an oven will be hotter than another, or the far end may be hotter than the front, or if the baker have a fresh flour it may dry out in baking more than another kind. Again, in weighing off the dough, however clever a man may be, he cannot cut off from the mass exactly 4 pounds 5 ounces, and the piece or pieces he adds to make weight sometimes do not adhere to the proper loaf and get 'moulded' or made up with the wrong loaf, so that if one be light weight the other will be overweight.") Now, I will ask you whether this statement as I have read it to you, with reference to the difference in weight in dough, when exactly the same weight went into the oven and came out as is mentioned here, is justified by the fact in your experience as a baker of loaf bread in the City of Chicago.

A. It is.

Q. Is there any accepted rule among the bakery trade in the City of Chicago with reference to the time when bread is commonly known as stale bread?

A. No, there is not.

89 Q. Why not.

A. Because there seems to be a great difference of opinion, a great difference in the quality of the bread and the place that it is kept, etc.

Q. In other words, some people will consider bread stale that others would not consider to be stale?

A. That is true.

Q. Everybody will agree that some bread that has been kept in a particular manner is stale about 24 or 36 hours afterwards, while other bread of another quality, kept in another way, kept in another

place will generally be considered not to be stale at that time; is that true?

A. That is true.

Q. Does the question of whether people consider bread stale bread or not stale bread also depend in a measure upon the quality of bread?

A. Quality and kind, yes.

Q. Does it also depend in a way, upon the size of the loaf?

A. Very largely, yes.

Q. In what way; explain to the Court with reference to the custom, etc., in your own way, take, for example, such a loaf as is shown here, sold here in Chicago, like this (indicating); will that get stale, what you call stale quicker than a loaf of bread like this (indicating)?

A. Well, what I would call stale, that small loaf would become stale in about 48 hours.

Q. So you would call it stale?

A. Yes.

Q. You mean this one (indicating) Exhibit A.

A. Yes, the small one.

Q. Forty-eight hours from when?

A. From the time it leaves the oven.

Q. That is what you call it?

A. Yes.

Q. Other people fix a different time.

A. They do yes.

Q. Now, as to the life of this size here (indicating Ex. R).

A. I should say that would not become stale for at least a week; in fact, it is better eating after three or four days than it is
90 when it is baked.

Q. And is there any accepted meaning in the bakery trade of the City of Chicago as to what fancy bread is?

A. No, I don't know what it is myself?

Q. Isn't there a demand, and hasn't there always been a demand in the City of Chicago, in the ordinary course of the bakery business for loaves of bread weighing two pounds and a half, or two pounds and three quarters, three pounds and a half and four pounds and a half, that is, weights substantially other than the weights prescribed in this ordinance, being two, three, and four pounds?

A. Well, there is in a certain class of trade, in the restaurant trade, or the trade that caters to sandwich orders.

Mr. Rubens:

Q. Bread is not sold and has not been sold in the City of Chicago according to weight, has it?

A. No, it has not.

Q. That is not the customary way and has not been the customary way in the City of Chicago?

A. No.

Q. It is sold according to price, isn't it?

A. Yes.

The COURT: According to what?
Mr. RUBENS: Price.

Q. In other words, it is sold in loaves. I am now speaking of loaf bread that costs five cents and multiples of five cents, 10, 13, and 20 cents.
A. Yes.
Q. Has it been customary to vary the weights of those loaves that were sold according to the prices that I have indicated?
A. Yes, the sizes vary according to the cost of the raw material and other expenses that go to make up the bakery business.
Q. And the competition among the bakers themselves.
A. Yes.
91 Q. Isn't it a fact that there is no standard loaf of bread in the sense of shape or of quality in the City of Chicago; is it or is it not a fact?
A. Well, there are so many shapes and qualities and sizes that I don't think there is a standard.
Q. Isn't it a fact that in various parts of the city, where people from various countries reside and live, there are different demands for loaf bread, not only with reference to the material out of which it is made, as to whether it is to be made out of wheat flour or out of rye flour, or as to the shape, the size of the loaf, the admixture of lard, butter, milk, eggs and the like; isn't that true?
A. Yes.

Cross-examination.

By Mr. CASSELS:

Q. I will ask you to look at this loaf Exhibit "A" (indicating) isn't it true that in the largest number in a very large proportion of the stores of Chicago, this is the loaf, the size and shape, in a general way, of the loaf of bread that is commonly sold?
A. No, I should say not.
Q. How do you describe this loaf of bread Exhibit G, what do you call it?
A. We call that a pan loaf, single pan loaf of bread.
Q. Do you make the single pan loaf?
A. We make a few.
Q. What shape do you usually make?
A. We use about that shape for a single pan loaf.
Q. What proportion of single pan loaves do you make with reference to all bread that you make?
A. It would not amount to over 500 loaves a day.
Q. As a matter of fact, your bakery is engaged in making other kinds of bread, is it not, largely?
A. Yes.
Q. There are other bakeries which confine themselves to making this kind of bread?
A. There are some that make a good deal of that shaped bread.

92 Q. Are there not bakers that make practically no other shape but this?

A. No.

Q. Don't you know of any?

A. No.

Q. Is it not true that this is the size and shape of a loaf that is most commonly sold in grocery stores (indicating exhibit A).

A. No.

Q. Are you sure of that?

A. I am sure of it.

Q. What is the size and shape that is most commonly sold?

A. The most common size is two loaves baked in a pan.

Q. I see what you mean now; in other words, two loaves just like this, but baked together, so that they can be broken?

A. Two loaves of wheat bread, yes.

Q. When they are broken apart don't they look substantially like this?

A. There is crust on three sides; the other side is open.

Q. In other words, the only difference is instead of there being crust on four sides there is crust on three?

A. Yes.

Q. The other side is broken off?

A. Yes.

Q. In other words, a loaf like this, having a crust on three sides is the loaf commonly sold in the retail stores in Chicago?

A. There is a great deal of it sold.

Q. Isn't it a fact that more of that is sold than any other kind?

A. Yes.

Q. Here is the loaf, a loaf of that kind, a loaf which approximates a pound? Exhibit K.

A. Yes.

Q. And of rectangular shape?

A. Yes.

Q. Is most commonly sold?

A. Yes.

Q. In all parts of the city, except those parts which are inhabited say by some particular nationality almost exclusively, isn't the proportion of bread sold in a loaf of this kind very much larger than any other loaf?

A. Yes it is.

93 Q. In some places practically all the bread that is sold is sold in this shape?

A. Why I don't think that in any territory it will exceed 60 per cent.

Q. You think it will equal 60 per cent.

Mr. RUBENS: It will not exceed 60 per cent in any territory in Chicago?

Mr. CASSELS:

Q. In any territory?

A. No.

Q. What is the other 40 per cent made up of?
A. Made of rye and round loaves.
Q. The shape of the rye bread is substantially like this (indicating Exhibit K).
A. No it is a long loaf baked on the other side.
Q. Is this rye bread (indicating Exhibit H)?
Mr. RUBENS: Yes, rye bread.

Mr. CASSELS:

Q. Yes, like this only smaller; in other words, instead of being square it is round?
A. Yes; there is a loaf there (indicating) Exhibit H.
Q. That is the common form in which rye bread is sold, is it?
A. Yes.
Q. In Chicago?
A. Yes.
Q. That shape?
A. Yes.
Q. That size?
A. Yes.
Q. And rectangular?
A. Yes.
Q. Is this baked in a pan?
A. No, it is baked on the sole of the oven.
Q. And doesn't have the square corners that the wheat bread has?
A. No, not baked in a pan.
Q. If a person were to go into the ordinary grocery store in Chicago, aside from these particular parts of the city that are inhabited almost exclusively by people from some foreign country, if a person goes into a store and asks for a loaf of bread, what
94 does he get?
A. He usually states whether he wants white or rye.
Q. Suppose he asks for a loaf, what kind would he get, if nothing more is said.
Mr. RUBENS: Depends where.

Mr. CASSELS:

Q. I say, in every place in Chicago, except the foreign communities.

Mr. RUBENS: That is the majority of Chicago, the greater part of Chicago.
Mr. CASSELS: Exclusively or substantially?
Mr. RUBENS: Exclusively.

Q. In mostly every store in the City of Chicago, you can take Ravenswood, where I live.
Q. Yes, suppose you go into a store in Ravenswood, what kind would you get?
A. You are just as likely to get a round loaf as square bread.
Q. As a matter of fact, wouldn't you be offered a loaf like this, as a usual thing (indicating) Exhibit K.

A. No, I have sent my children to the store for bread and they either bring home a round loaf or a square one.

Q. You mean a round loaf like this (indicating) Exhibit H?

A. Little different shape.

Q. Little different shape from this, but about the same thing?

A. Yes.

Q. How long have you been in the baking business you say?

A. I have been in the bakery business since 1881.

Q. Has bread ever sold for six cents in Chicago, six cents a loaf?

A. You mean when?

Q. Since you have been in the business?

A. Yes.

Q. Has it ever been sold for any other price besides five or six cents?

95 A. I think when I first started in the bakery business for my brother I had then charge of the delivery of bread in the morning; I think we got seven cents then for our Eureka bread.

Q. Bread has been sold for six or seven or five; has it ever been sold for any other price, these loaves that were sold for 6, 5 and 7 cents, weighed approximately how much?

A. Weighed about a pound.

Q. Has a pound loaf of white bread ever sold for other prices than these, so far as you recall?

A. You mean less than five cents?

Q. Less than 5 cents or more than 5 cents?

A. That is the highest price that I remember was then.

Q. Has a pound loaf of white bread, a loaf weighing substantially a pound ever retailed for less than 5 cents?

A. Not that I remember.

Q. Not that you recall.

A. Not generally.

Q. In any special instances, in any special localities?

A. There are places yes, where you can get it for less than 5 cents today.

Q. For how much?

A. I don't know as to the weight, because I have never weighed it

Q. A loaf weighing substantially a pound?

A. It looks something like that.

Q. How much do they charge for it?

A. About 4 cents.

Q. There are places. I want to ask you, you speak of the Peel oven—you have testified that many a batch of bread is put in that is one batch of bread to bake, when loaves are taken out some will weigh a little more and others a little less, because that bread is baked a little more you testified to that?

A. Yes.

Q. How large a lot is that batch of bread?

A. You mean how much will an oven hold?

A. Yes, how much will your oven hold?

A. About 450 loaves.

96 Q. You mean to put them in at once?

A. Takes them about 10 minutes for them to put in our pan bread.

Q. How many loaves on each pan?

A. How many loaves on each pan?

Q. Yes, are these 40 loaves all on one pan; do you put them all in together?

A. No.

Q. How many different lots are there in the 450 loaves?

A. The bulk of our bread; I am speaking now of the cream bread, is baked in pans holding two loaves and those are strapped together, so that the pan placed on the pull holds four loaves.

Q. Yes, four at a time?

A. Yes sir.

Q. Put in four at a time?

A. Yes.

Q. Is there a difference between these four; is there a difference between the weight of these four loaves constituting one pan, when you take it out?

A. Well, they will weigh pretty close, because they are scaled pretty close and they are baked approximately the same, but the difference occurs in the oven, the bread that is put in the back of the oven, which is put there first, and the bread which is put in the front of the oven, which is placed there last.

Q. In other words, the different pans will vary somewhat?

A. They will vary, yes.

Q. How much?

A. I should judge half an ounce, easy enough, may be more.

Q. May be less?

A. Well, hardly, not less than half an ounce.

Q. That is, the size of the loaf then, and the weight of the loaf would vary approximately half an ounce?

A. Half to three-quarters.

The COURT:

Q. In that connection, I would like to ask — the last bread that is put in is the first taken out?

A. It is the first taken out, because the ovens are so constructed you have got to take them out in order to get the other.

97 Mr. CASSELS:

Q. Are there any ovens so constructed that you can take out first the first bread that is put in.

A. No; it is impossible.

Q. In the scaling of bread you testified, I believe, that it is impossible to scale accurately?

A. Absolutely accurately.

Q. What do you mean by that; how much latitude or how much lee way or how much variance will there be commonly in the bakery—bakeries like yours, between the loaves of bread?

A. Commonly would be a variation of half an ounce.
Q. Is it always as much as half an ounce?
A. No; I say there will be a variation.
Q. That is the maximum, is it not?
A. No, sometimes it would run an ounce.
Q. That would be very carelessly scaled, would it not?
Q. You might say so, but I have watched scalers my whole period of life in the bakery business, and I have found that variation; you might term it carelessness, but there is no way of avoiding it, we have tried our best.
Q. Isn't it possible to scale bread so that you are sure that it will weigh a pound when it is baked?

Mr. RUBENS: You mean scale a pound or at least a pound?
Mr. CASSELS: At least a pound.
Mr. RUBENS: Sure; you can make it ten pounds; that is easy.

Q. Isn't it possible to scale bread so that you will be sure that it will weigh a pound?
A. I should say not, that is unless you want to be on the safe side and give away an ounce or half an ounce with every loaf of bread; it would be a very expensive operation.
Q. You would not have to give away an ounce?
A. In order to be absolutely safe.
Q. No, suppose you want to bake a pound loaf of wheat bread, how much dough would you scale off, what would be the weight of the dough?
A. Be safe at 18½ ounces.
98 The COURT: 18½?
A. Yes.

Mr. CASSELS:

Q. You would allow 2½ ounces for the baking?
A. Yes, and allow for any little difference; it all depends upon the absolutely correct scaling and the difference in the baking.
Q. You undertsand I am speaking now of the way you bake; you would be safe at 18½ ounces; would you be safe at 18 ounces?
A. No, hardly.
Q. Why?
A. Because there would be quite a number of instances there that you would get a little less than a pound, for various reasons.
Q. Supposing the dough is carefully scaled at 18 ounces.
A. If the dough is carefully scaled at 18 ounces and it gets into the right part of the oven it will come out all of a pound, but it is likely to come out less than a pound, for instance, it gets into the first part of the oven or if the baker is a little careless and don't get it in there in the right way.
Q. How long does it take to bake bread?
A. About 15 minutes for pan bread.
Q. You are speaking about an oven like yours?
A. Oven commonly used in the City of Chicago.
Q. How many ovens as large as yours in the City of Chicago?

A. How many at that time?

Q. Haven't you one of the largest ovens of its kind?

A. Yes.

Q. Aren't there many small bakers who have much smaller ovens?

A. Small bakers, the majority of them use those brick Peel ovens; they don't have iron.

Q. Their oven is not made to bake as many loaves as your oven is it, at a time?

A. Those Peel ovens are all about the same size.

99 Q. How many loaves do they ordinarily bake at one time?

Mr. RUBENS: Loaves weighing approximately a pound.

Mr. CASSELS: Loaves weighing approximately a pound.

A. They will vary from 400 to 450 loaves.

Q. It would be possible then by scaling the loaf at 18½ ounces to have a pound in each loaf?

A. You would sometimes have a little more and you would sometimes have a little less but you would average——

Q. —a pound.

A. —about a pound.

Q. In other words, if a baker desires to he may make a loaf which he knows will weigh a pound.

Mr. RUBENS: At least a pound.

Mr. CASSELS: At least a pound.

A. Yes, by putting the proper amount of dough in.

Q. If he is careful with the baking he is sure that the entire amount of bread that comes out of the oven will weigh a pound.

A. By being liberal and giving half an ounce more than he really ought to, he can get it out that way.

Q. Whether he ought to or not is another question. I want to ask you this: You say there is no fixed rule for stale bread. Stale bread is sold common is it not?

A. Yes stale bread is sold in the city.

Q. Did you ever heard it called by any other name?

A. No, not stale bread.

Q. When any one asks for stale bread you know definitely enough what is meant.

A. We make bread that is brought into the grocery stores on the wagons.

Q. When you sell it?

A. Yes.

Q. And you sell it as such?

A. Yes.

Q. You never call it anything else but stale bread?

A. No.

Q. Have you ever heard the term fancy bread?

A. No, I didn't until I heard of this ordinance.

100 Q. Do you know whether or not there is such a thing as fancy bread in Chicago.

A. No, I never heard bread called fancy bread before I read it in the ordinance.

Q. You don't know if there is such?

A. No I don't; I don't know what I would call it.

Redirect examination.

By Mr. RUBENS:

Q. When you said that you have heard of bread weighing approximately one pound, sold at 7 cents and 6 cents and four cents, these various prices did not apply to bread of exactly the same weight and exactly the same quality did it?

A. No, it was a high quality of bread that was sold.

Q. In other words bread may be sold at a profit at four cents a pound, if made of one kind of material, and it may be worth 8 cents a pound on the same percentage of profit if it is made of another kind of material?

A. Yes, that is true.

Q. In other words, the price of the bread alone does not indicate anything?

A. No.

Q. As to the quality.

A. No.

Q. Or even as to the size. Bread is not sold according to weight in Chicago is it?

A. No, it is not.

Q. Now, you say that by scaling liberally you can get your bread out on an average weighing a pound; that is, when it leaves the oven, when it is baked it will weigh one pound will that bread that weighs exactly one pound when it leaves the oven, will that bread weigh one pound until it is considered stale by everybody?

A. No it won't. It will weigh less. A. It will weigh less.

Q. In other words, although the bread has been carefully scaled and weighed exactly one pound when it leaves the oven, it necessarily must weigh less than one pound before it gets stale?

A. It will.

101 Q. And why?

A. Because it evaporates.

Q. And that depends again upon the atmosphere, the condition of the weather, the condition of the place in which it is kept, the manner in which it is kept, and the quality and size of the loaf?

A. Yes, all those things.

Q. Is there any way do you know by which bread can be made to weigh safely and actually one pound until it gets stale?

A. It will vary; it will deteriorate in weight.

Q. Unless you make it so big that even then it would be much more than a pound wouldn't it?

A. Yes.

Q. Now I show you this loaf of bread (handing witness the so called Blonski loaf weighing over 6 ounces, Exhibit N, if a baker would put that much in it and label it one pound, as this baker does, in the City of Chicago, then he would be safe to have a pound

loaf, a loaf weighing at least a pound at all times until it gets stale and later on; that would be the safe way of doing it?

A. It would be perfectly safe, yes.

The COURT:

Q. After the bread leaves the oven does it ever get heavier in weight?

A. No.

Q. Never under any circumstances?

A. No, it deteriorates; it evaporates.

Q. The damp weather then won't make it weigh any more?

A. Not when it comes out of the oven no.

Recross-examination.

By Mr. CASSELS:

Q. When you said that if you scaled the dough at 18½ ounces you would have a loaf that would weigh a pound, at last a pound, at what time did you mean that it would weigh a pound?

A. I mean when it comes out of the oven.

102 Q. As a matter of fact, is-'t most of the bread that is sold in the groceries sold within 36 hours after it is delivered, or else sold as stale bread?

A. Well, there is still sale for bread on the second day after it is delivered.

Q. That is 36 hours?

A. That might be 48 hours.

Q. It is true, isn't it, that practically after that time customers take it as stale bread?

A. Usually it comes back within 48 hours.

Q. It comes back to you within 48 hours any way?

A. Yes.

Q. Comes back to your shop from the grocery?

A. Yes sir.

Q. When you want to be sure that you have a pound loaf, or a loaf weighing at least a pound——

Mr. RUBENS: At what time?

Mr. CASSELS:

Q. From the time that it leaves the bake shop and during the next 36 hours, say, couldn't you scale your bread so as to keep it that way?

A. It would depend altogether upon the atmospheric conditions and the place where it is kept.

Q. Couldn't you scale it so that you could get it there under the ordinary conditions which prevail in Chicago, get it so it would weigh a pound?

A. By baking it heavy enough, certainly.

Q. How heavy do you estimate that you would have to scale the dough?

A. In that time bread might deteriorate with the experience I have had, by an ounce or an ounce and three quarters.

Q. By deterioration what do you mean?
A. I mean evaporate.
Q. You must have a good deal of water in that bread?
A. No more than the ordinary loaf of bread.
Q. What sort of a day was it when the weight decreased an ounce?
A. What is that?
103 Q. What was the weather when the bread decreased in weight an ounce or more?
A. Very dry day.
Q. Where was the bread kept?
A. Kept in various places where it is often kept, on the counters in the grocery store.
Q. Do you think that bread commonly loses an ounce?
A. In that length of time?
A. In that length of time, yes.
A. Yes.
Q. Have you ever weighed it to find out?
A. Yes.
Q. How much would the deterioration ordinarily be from the time the bread is removed from the oven until the end say of the first 24 hours, the end of the first day; that is during the first day after it is removed from the oven?
A. It will depend, of course, upon the atmospheric conditions, upon the dryness or dampness of the weather.
Q. What will be the average?
A. It might vary an ounce and a half and it might only vary three quarters of an ounce.
Q. Does it not often vary less than half an ounce?

Mr. RUBENS: We will admit that the variation is various, as depending upon the weather and the place where it is kept, we will admit that, and we have so shown it ourselves.

Mr. CASSELS:

Q. What is the maximum of this amount?

Mr. RUBENS: Within what time?

Mr. CASSELS:

Q. Within the 24 hours after it leaves the bakery.
A. My experience is about an ounce and a half.
Q. Could you not scale your bread so that it would weigh one pound during the whole period?

Mr. RUBENS: Of 24 hours.

Mr. CASSELS:

Q. Of 24 hours after it leaves the bakery.
A. You would have to add that much to it.
Q. That is what you would have to do?
A. Yes.
Q. You can be just as sure that it will weigh at least one pound

at the end of the 24 or 36 hours as you can that it will weigh
104 at least one pound when it leaves the oven?

A. By scaling the dough 20 ounces you probably could get it out.

Q. You say you would have to scale 20 ounces?

A. I think so yes.

(A recess of five minutes was here taken.)

Mr. Cassels: If the Court please, I would like to ask one more question of the last witness.

Robert J. Bremner resumed the stand for further re-cross examination by Mr. Cassels:

Q. Mr. Brenner, just a question about this Peel oven. I want to ask you if there is the same degree of heat in all parts of the oven?

A. Well, pretty nearly, from the construction of the oven it is almost impossible to vary the heat.

Q. Isn't there some place in the Peel oven that is commonly called the coolest place?

A. That only becomes known to the baker; there is a hot spot here and a cool spot there, that is only known to the baker.

The Court:

Q. Any regularity about it?

A. That hot spot or cool spot may come in any part of the oven, either the front part or the back part.

Q. Doesn't it usually come in the back part?

A. No I could not say that.

Q. Isn't there a custom among some bakers, perhaps you don't know of it, to put the first dough in the coolest or cooler part of the oven?

A. The oven has got to be loaded regularly right across.

Q. You mean from one end to the other?

A. From one side to the other.

Q. The back end going in first?

A. Yes.

Q. There is no other way of loading it?

A. There is no other way of loading it.

105 Q. In your particular Peel ovens are there any particular places that are cooler than the others?

A. That is the fault of the construction, it ain't because it is desired to be that way, maybe the bricks in that part of the oven bottom are a little more porous or a little more solid than the others; that is what causes the heat or the cool spot; if anything it is a fault in the oven instead of being a point that they wish to attain.

ALEXANDER KLEINSTUBER called as a witness on behalf of the defendant having been first duly sworn testified as follows:

Direct examination.

By Mr. RUBENS:

Q. What is your full name?
A. Alexander Kleinstuber.
Q. You live in Chicago?
A. Yes.
Q. Are you employed by one of the bakeries in Chicago?
A. Yes.
Q. By which one?
A. By R. J. Bremner.
Q. In what capacity?
A. Salesman.
Q. In your capacity as salesman is it your duty to visit various places in the City of Chicago where bread is sold?
A. I am at grocery stores.
Q. Grocery stores particularly?
A. Yes sir.
Q. I will ask you if in your visits to these grocery stores you become familiar with the various kinds of bread and loaf bread that have been sold in the City of Chicago in the last five years?
106 A. Yes.
Q. I will ask you whether a loaf of bread like this from Blonski's bakery (indicating) weighing largely over six pounds is a loaf of bread commonly sold in parts of the city?
A. Yes.

Mr. RUBENS: I offer this loaf of bread in evidence.

Said loaf was thereupon marked defendants exhibit N a photograph of which said loaf of bread is as follows to-wit:

Defendant's Exhibit N.

107 Q. Do you know how much this bread weighs?
A. It weighed 7 pounds when we put it on the scales.
Q. You have seen larger loaves?
A. I have put them on the scales, sometimes they weigh 7 pounds 2 ounces.
Q. Have you ever seen loaves of bread of this size?
A. Yes.
Q. Have you ever seen loaves of bread of this shape?
A. Yes.
Q. Commonly sold in grocery stores?
A. I guess they are mostly sold in Italian districts.
Q. Have you ever seen bread like this (indicating)?
A. Yes.
Q. Loaf bread.
A. That is sold in the Italian district.
Q. That is also sold in the Italian district?
A. Yes.

Mr. RUBENS: I offer these loaves of bread in evidence a photograph to be supplied for the record.

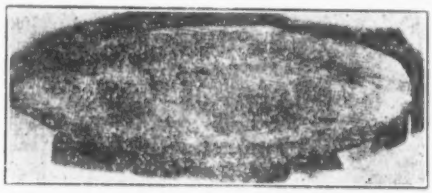
Said loaves of bread were thereupon marked Defendant's Exhibits O and P respectively, photographs of which said loaves of bread are as follows, to-wit:

Defendant's Exhibit O.

Defendant's Exhibit P.

108 Q. Have you ever seen bread of this shape (indicating)?
A. Yes.

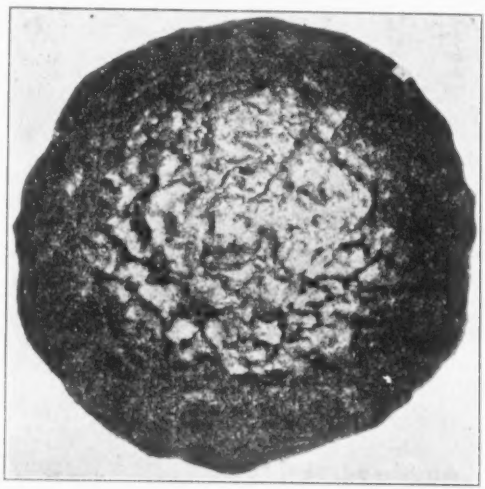
Said loaf of bread was thereupon offered in evidence, marked Defendant's Exhibit Q, a photograph of which said bread is as follows, to-wit:



Defendant's Exhibit Q.

109 —. Have you ever seen bread of this shape (indicating)?
A. Yes I have seen bread of that shape.
Q. Commonly sold in certain parts of the city?
A. Commonly sold.

Said loaf of bread was thereupon offered in evidence, marked defendant's Exhibit R, a photograph of which said bread is as follows to-wit:



Defendant's Exhibit R.

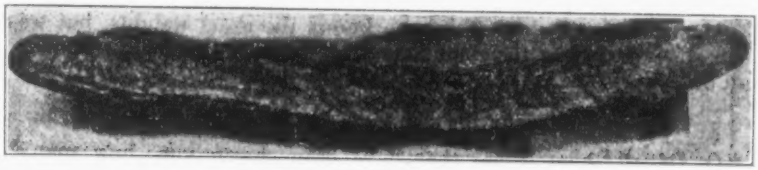
110 —. Have you ever seen loaves of bread like this (indicating)?
A. Yes.
Q. Commonly sold in the City of Chicago?
A. Yes.
Q. Prior to January 6, 1907?
A. I have not seen them lately very much.
Q. You haven't seen them made?
A. I haven't seen them of late sold very much in my district.
Q. Not in your district, but you have seen them?
A. I have seen them made, yes.
Q. You have seen them sold?
A. Yes, seen them sold a year ago.

Said loaf of bread weighing over ten pounds was thereupon offered in evidence, marked Defendant's exhibit S a photograph of which said bread is as follows to-wit:

Defendant's Exhibit S.

111 Q. Have you seen loaves of bread like this sold (indicating)?
A. Yes.
Q. Commonly sold in the City of Chicago?
A. Yes.
Q. As an ordinary article of merchandise.
A. I have sold more in restaurants and saloons.

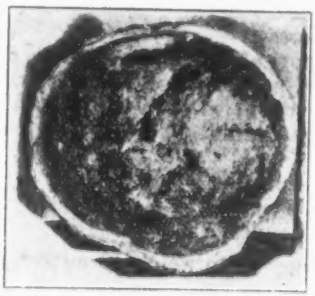
Said loaf of bread was thereupon offered in evidence marked defendant's Exhibit T, a photograph of which said bread is as follows to-wit Exhibit T:



Defendant's Exhibit T.

112 —. How about this bread here, have you seen that (indicating)?
A. Yes.

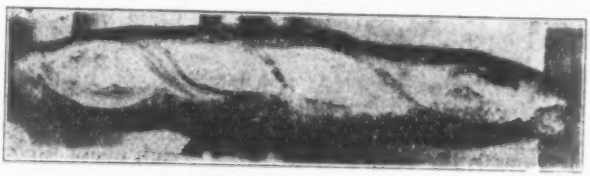
Said loaf of bread was thereupon offered in evidence marked Defendant's Exhibit U, a photograph of which said bread is as follows, to-wit:



Defendant's Exhibit U.

113 —. Have you ever seen bread like this sold in the City of Chicago (indicating)?
A. Yes, sir.
Q. Loaf bread?
A. That is sold in restaurants a good deal.

Said loaf of bread was thereupon offered in evidence marked Defendant's Exhibit V, a photograph of which said bread is as follows, to-wit:



Defendant's Exhibit V.

114 Mr. RUBENS: I will later on show the exact weights of all these. I have got them marked right here. I will have the scales here at two o'clock.

Mr. CASSELS: I will ask him what the weights are.

Mr. RUBENS: I don't think he knows the exact weights, but we can show and have the man here who weighed them all. That is all of this witness.

Cross-examination by Mr. CASSELS:

Q. Of all these loaves that have been shown you, how many weigh more than six pounds?

A. How many? I guess there is only two loaves that weigh more than six pounds.

Q. What part of the city do you work in?

A. Between Division street and Kinzie.

Q. Between Division and Kinzie?

A. And from Larrabee over to Lincoln Park Boulevard.

Q. Where do you do most of the business?

A. With grocers.

Q. All through that district?

A. Yes, grocery stores.

Q. That includes part of the Italian district, does it?

A. Yes, Italian and part of the Jewish district.

Q. I want to ask you in what district would you find a loaf of this kind (indicating) Exhibit O.

A. Italian.

Q. What do you think that weighs?

A. I guess about 14 ounces.

Q. It is marked 16 ounces.

Mr. RUBENS: It happens to weigh 16 ounces, exactly.

Mr. CASSELS:

Q. Do you find this outside of the Italian districts?

A. No sir, there is nobody eats it but the Italians.

Q. That is true of this also, isn't it (indicating) Exhibit P.

A. Yes, that is nobody but Italians.

Q. It is true of this one (indicating) Exhibit O.

A. This one the poppy seed you showed me, that is the Jewish bread. I made a mistake.

115 Q. That is not popularly sold in the City?

A. No, that is sold in the Jewish district.

Q. Do you have an idea how much that weighs. Exhibit O?

A. Generally weigh about 14 ounces, I guess.

Q. 16¼, I guess. When you find bread like this it is made up of loaves of bread this size?

A. Yes.

Q. About a pound?

A. Yes.

Q. And so with the Italian breads, they weigh about a pound?

A. We weighed a lot of them and they only weighed 14 ounces.

Q. Have you ever weighed any that weighed more than 14 ounces?

A. Yes sir.
Q. Approximately a pound?
A. Yes.
Q. You found some that weighed approximately a pound, I suppose?
A. Yes.
Q. I want to ask you about this loaf (indicating circle) Exhibit P.
Q. In what parts of the city is this generally sold.
A. I guess it is sold in the Italian.
Q. That is not generally sold.

Mr. RUBENS: We don't claim that everybody in Chicago eats the same kind of bread, on the contrary one of our contentions is that your ordinance is bad because it sets a standard which is unreasonable in a city like Chicago.

Mr. CASSELS: These exhibits show that it is reasonable, so far. Here the Italian bread is only a pound.

Q. How much does this weigh, approximately?
A. I could not tell you.
Q. Have you ever weighed bread of this sort?
A. I don't know.
Q. Is this about the size it is, assuming it weighs about 30 ounces?
A. I have not seen them.
116 Q. As a matter of fact there is very little of this bread sold?
A. Very little.
Q. It does not amount to very much?
A. No.
Q. What kind of bread is that?
A. I don't know what kind of bread that is.
Q. How does it vary from the kind of bread you ordinarily sell?
A. I think it is made out of nothing but water and flour, the way it looks to me.
Q. It is common white bread?
A. Yes.
Q. Has no unusual ingredients?
A. No.
Q. The two heavy loaves—this one, Exhibit R, did you buy this one?
A. Is it from Blonski?
Q. Yes.
A. Yes, I bought that.
Q. When did you buy it?
A. Bought it last Friday.
Q. What kind of bread is it?
A. Dark rye.
Q. You said it weighed how much?
A. 7 pounds, one ounce, when I bought it.
Q. Is this the usual size?
A. That is the usual size of their bread.

Q. Couldn't this just as well be made in a 6 pound loaf?
A. I should think that they could.
Q. It would be just a little smaller?
A. Little smaller.
Q. This weights about 7 pounds?

Mr. RUBENS: Over seven pounds.
Mr. CASSELS: Over seven pounds?

A. Yes.
Q. How much more?
A. Seven pounds, one ounce, when I bought it.
Q. This could as well be made in a loaf of six pounds. I want to ask you, is this loaf in common use in the City of Chicago so far as you know?
A. Polacks buy it a good deal.
Q. What is it made of?
A. Rye.
117 Q. It is rye bread with—what is this?
A. Carroway seed.
Q. That is a special sort of bread, isn't it?
A. It ain't a special sort; it is made for them people.
Q. Outside of Jewish and Polish communities it would not be sold?
A. No, I have never seen it sold.
Q. What is the price of that loaf?
A. Paid 20 cents for it retail.
Q. I want to ask you, do you know about this, what kind of bread is this (indicating) Exhibit S.
A. I judge it is rye bread.
Q. How much does it weigh?

Mr. RUBENS: I think it weighs 10 pounds.

Mr. CASSELS:

Q. Have you seen a loaf of this kind in Chicago; do you see many of these loaves?
A. Not many; I see them once in a while.
Q. It is a rare thing, isn't it, to see a loaf such as this?
A. Yes.
Q. Would the quality of this be any different if it was made into three loaves or two loaves, instead of one?
A. I guess it would not keep as long as this.
Q. How long would a 6 pound loaf of bread like this keep?
A. It would keep a week or so.
Q. You have examined the way in which this bread is sold by the grocery stores.
A. Yes.
Q. Do they always sell a full loaf of bread like this?
A. No, they cut them.
Q. Isn't it customary to cut this and sell it by weight?
A. No, they don't sell it by weight; they sell it by the piece.
Q. Instead of selling a whole loaf like this they cut it in pieces?

A. Cut it in half.

Q. In other words, they sell this in two parcels of 3½ pounds each; that is the common way of selling it? Don't they cut this in half?

A. I don't know; I could not tell you; I have never seen
118 them except it is ordered.

Q. This is a special sized loaf?

A. It has to be specially ordered.

Mr. RUBENS: That is not specially ordered; it is bought in the ordinary course of trade.

Mr. CASSELS: I am asking him. He knows.

Q. This in your opinion is a very unusual loaf, isn't it?

A. Well, as big as that yes.

Q. This is rye bread, what is the difference, if any between these two, have you examined them (indicating)?

A. I guess that is coarser rye than the other; it looks to me.

Q. And has carroway seeds in it?

A. Yes.

Q. If this one was sold in pieces (indicating Exhibit S) they would sell this in pieces too, (indicating Exhibit R).

A. I suppose.

Q. If this loaf was cut would it keep any longer?

A. Dry out quicker.

Redirect examination.

By Mr. RUBENS:

Q. Isn't it a fact that the reason these big loaves are in demand is because people want to buy a loaf with as little crust as possible?

A. Yes.

Q. And the larger the loaf the less crust they get?

A. Yes.

Q. And that is the reason why these large loaves are in ordinary demand in certain quarters and are baked for that purpose?

A. Yes.

Mr. RUBENS: That is all.

CARL W. ESEMAN a witness called on behalf of the defendant having been first duly sworn, testified as follows:

119 Direct examination.

By Mr. RUBENS:

Q. What is your name?

A. Carl W. Eseman.

Mr. CASSELS: I take it in each case the record shows there is an objection?

Mr. RUBENS: It has been agreed and stipulated from the beginning that all the evidence goes in subject to the objection.

Mr. CASSELS: Yes.

Mr. RUBENS:

Q. What business are you in?

A. I am managing a retail grocery business for my father.

Q. Whereabouts?

A. 47th street and Lake avenue.

Q. How long have you been managing a retail grocery business?

A. About 5 years.

Q. Are you familiar with the food stuffs that are sold in the City of Chicago through grocery stores?

A. Yes sir.

Q. I will ask you what food stuffs you can mention which are sold in the City of Chicago by the package and regardless of the weight?

A. Why, cereals.

Mr. CASSELS: What is this designed to show?

Mr. RUBENS: The design is to show exactly this: That neither the legislature nor the city council of Chicago have the right under the constitution of singling out the vendor of one kind of food stuff and requiring of him that he shall only sell by weight, when all the other vendors of food stuffs are permitted to sell regardless of weight, by package which does not contain any particular quantity of goods. It is right in line with a large number of cases which I will present to your Honor.

Mr. CASSELS: If your Honor please there will be no end to the issues in this case if counsel is allowed to go into other kinds of food stuffs.

120 Mr. RUBENS: As we attack the power——

Mr. CASSELS: The best evidence would be the ordinance.

Mr. RUBENS: We attack the power of the city.

The COURT: I will hear it, subject to the objection.

Mr. RUBENS:

Q. Are there a large number of food stuffs which are sold without regard to weight?

A. Yes sir.

Q. Look at this package of Quaker oats; is that sold according to weight or according to package?

A. According to package.

Mr. RUBENS: I offer it in evidence.

Mr. CASSELS: Is this the way you sell it, or is it the way it is generally sold?

A. Generally sold.

Mr. RUBENS: Take this package of Quaker wheat berries; is that sold according to weight or according to package?

A. According to package.

Q. Take Pettijohn's breakfast food; is that sold according to package or by weight?

A. According to package.

Q. By package irrespective of weight?

A. Yes sir.

Q. Take this package of cheese, is this cheese sold by package in this way or by weight?

A. It is sold——

Q. In this way?

A. Yes.

Q. All cheese like this is sold irrespective of weight?

A. It is sold irrespective of weight, bought by the dozen.

Q. Take these corn flakes; are they sold irrespective of weight and merely by the package?

A. Yes.

Q. Are these articles which I show you articles which are in general use in the City of Chicago and are subjects of general trade and commerce in the ordinary grocery store of Chicago?

A. Yes sir, they are very general.

Q. And have been so for years?

A. Yes.

Q. Take the Nabisco biscuits here, are these sold according to weight or irrespective of weight.

A. In that form they are sold by the package; they also come in larger cans and are sold by weight.

121 Q. But in this form they are merely sold by package?

A. Yes.

Q. Are they also sold by package without regard to weight?

A. Yes, we sell them entirely that way.

Q. In your store?

A. Yes.

Q. Take this Uneeda biscuit, is that sold by package, irrespective of weight?

A. Yes.

Q. Always has been since you remember?

A. Always has been sold by the package.

Q. And that is the ordinary way in which that is packed and sold?

A. Yes.

Q. Take these potato chips; are they sold by package irrespective of weight?

A. Yes, sold by the package.

Q. Irrespective of weight?

A. Yes.

Q. And have been dealt in that way for years?

A. Yes.

Q. And are so now?

A. Yes.

Q. Take this package of shredded whole wheat; how is that sold, merely by package or by weight?

A. By the package.

Q. No weight indicated on the package at all?

A. No sir.

Q. That is the ordinary way in which it has been sold and is sold in the City of Chicago and has been for years?

A. Yes.

Mr. RUBENS: I think I have among these samples one in which the weight is indicated on the package. It has crept in by mistake; I forgot to take it out. There is one on which the weight is indicated and I forgot to take it out. We will find it as we get along.

Q. Take these peaches; are they sold according to weight or by the can?

A. By the can.

Q. Irrespective of weight?

A. Yes.

122 Q. And have been so sold for years?

A. Yes sir.

Q. Take this fish here; is that sold by the can?

A. Yes.

Q. Salmon?

A. Sold by the can.

Q. Irrespective of weight?

A. I have never sold them by weight.

Q. Just by the package?

A. By the package and price.

Q. Take these sardines; are they sold irrespective of weight by the box, or tin, as it is called?

A. By the can.

Q. Have they always been sold that way so far as you know?

A. Yes.

Q. Take this jelly here; is that sold according to the weight or merely by the package?

A. By the package.

Q. And has been sold that way for years, and that is the ordinary way in which it is dealt?

A. The only way I ever knew.

Q. Take this soup here, tomato soup, put up in cans; is that sold by the weight?

A. By the can.

Q. Simply by the can, irrespective of the weight?

A. Yes.

Q. Take these tomatoes here, are they sold by the can or by the weight merely?

A. By the can.

Q. Irrespective of the weight?

A. Yes.

Q. Take this marmalade here; is that sold according to weight or according to the package?

A. According to the package.

Q. And that is the ordinary course of selling it in the City of Chicago, and has been for years?

A. Yes sir.

Q. Take this cheese here, McLaren's Imperial cheese; is that sold according to weight or merely according to the package;

A. According to the package.

Q. Take these dates here, are they sold according to weight, or are they sold in the box according to the package?

A. Sold in the box.
Q. And that is the ordinary course of dealing in them?
A. Yes.
123 Q. And has been for years in the City of Chicago?
A. As long as I know.

Mr. RUBENS: There is one that is sold by weight, and I wanted to take it out.

Mr. CASSELS: Two others that have not been offered; three all together.

Mr. RUBENS: Whatever they are, they want to go out, because I didn't expect, I didn't care to offer them, not sold by the weight, but the weight is marked on them.

Q. Take this corn here; is that sold by the package, irrespective of the weight, or is it sold by the can?

—. ——.

Q. Sold by the can?
A. Yes.

Cross-examination.

By Mr. CASSELS:

Q. Where is your grocery located?
A. 47th and Lake avenue.
Q. And you keep all sorts of produce there?
A. Yes.
Q. Household provisions?
A. Yes.
Q. Do you sell milk there?
A. No sir, I do not.
Q. Do you know how milk is sold in Chicago?
A. I have no idea, only buying it.
Q. How do you buy it?
A. By the bottle.
Q. Does the bottle show how much is in the inside of it?
A. I am not a house-keeper; and I never noticed.
Q. Do you sell cheese?
A. Yes sir.
Q. Besides that cheese in original packages how do you sell cheese in your store?
A. We sell some kinds of cheese by weight and others by the piece, by the cheese.
Q. In other words, when it comes in an original package you sell it by the package?
A. Sell it by the package.
Q. And when it comes in bulk or in a large package you sell it by the pound?
A. Yes.
124 Q. Isn't it true that you sell all of your bulk goods by the pound or by the quart?
A. Why, we sell them all by the pound.
Q. Do you sell anything by the quart?

A. No, not any more.
Q. Do you sell Pettijohn's breakfast food?
A. Yes.
Q. You testified that you sold by the package, this is the package?
A. Yes.
2. Do you know how much this weighs?
A. I have no idea.

Mr. Cassels: I want to call the Court's attention that as to this Pettijohn's breakfast food the weight is marked on the package.
Mr. Rubens: It is marked 23 to 25 ounces.
Mr. Cassels: It is marked 23 to 25 ounces.
Mr. Rubens: 23 to 25 ounces is marked on 2 or 3 of these packages.

Mr. Cassels:

Q. And you sell Quaker rolled oats?
A. Yes.
Q. Do you know how much the package contains?
A. No, I do not.
Q. Is this the only sized package that is sold?
A. The package used to be larger than that; the packages I know used to be marked 2 pounds at first, 2 pound packages.
Q. How much does this weigh, do you think?
A. I have no idea; I have no idea.

The Court: What is it marked?
Mr. Cassels: This package is marked, if the Court please, this package contains 24 ounces net of Quaker oats marked 2 pounds.
Mr. Rubens: Two pounds.
Mr. Cassels: I mean pound and a half, we are not giving the baker's pound. This is avoirdupois pound and a half, marked 24 ounces net. That is Quaker oats.
125 Mr. Cassels: The puffed rice, we will come to that in a minute. This is also marked: "This package contains 7 to 9 ounces, net." "This contains from 7 to 9 ounces net."
Mr. Rubens: In other words, there is a leeway given to weight of from 7 to 9, as there is in the other from 23 to 25, not any definite weight, your Honor, but saying it weighs no less than so much and no more than so much.
The Court: I have got it.
Mr. Cassels: One is marked 24 ounces net.

Q. Do you sell sugar at your store?
A. Yes.
Q. How is that sold?
A. By the pound.
Q. And tea?
A. Sold by the weight.
Q. Coffee?
A. Also by the weight.
Q. Salt?

A. That is sold by the box, but the boxes are supposed to weigh, two, three and five pounds.
Q. You really sell by the pound?
A. Yes, sell by the 5 pound bag.
Q. You charge by the pound?
A. No, we charge by the bag.
Q. Are those bags marked?
A. I don't know; I never weighed one, either.
Q. Each bag is supposed to weigh a certain amount?
A. Yes sir.
Q. You say you sell Quaker oats in packages. Do you sell oatmeal in your store?
A. Not in bulk only in packages.
Q. Do you know whether or not it is sold in bulk in Chicago?
A. Yes, I believe it is.
Q. If sold, how is it sold?
A. It is sold by the pound.

Mr. RUBENS: I want to ask you this question: Do you claim that there is any law of the State or any ordinance of the City of Chicago which requires anything to be sold by weight?
Mr. CASSELS: I am not claiming that.
Mr. RUBENS: Don't you admit that bread is the only thing?
126 Mr. CASSELS: No, I don't admit that.
Mr. RUBENS: What else is there?
Mr. CASSELS: There are a lot of things that have to be sold, if measured or weighed, under the laws of this state, the capacity—for instance the capacity of the milk bottle must be shown on the outside. It must be sold by the quart; that is not by the weight, but the capacity must be blown into the bottle, under a city ordinance.
Mr. RUBENS: You claim that as to milk there is some ordinance relative to the capacity of the bottle?
Mr. Cassels: I don't say that as to a pint or a quart, but I say it must be a pint or a quart and the capacity must be blown into the bottle.
Mr. RUBENS: Do you know of any state law or any ordinance which requires any food stuff to be sold by prescribed weights or measures, it is prescribed sizes.
Mr. RUBENS: Is there any other thing that you know of in this State, because we can shorten this examination.
Mr. CASSELS: I don't admit that.
Mr. RUBENS: Are there other things?
Mr. CASSELS: Yes, there are other things. For instance we have several ordinances that we would not want to go into with reference to measure and weight and many of them like the milk ordinance, have been held valid. I don't mean to say that in other commodities, like grain, or for instance oatmeal in bulk, that a person must either buy a pound or two pounds.
Mr. RUBENS: Do you know, can you point out any statute law or any ordinance, which requires any commodity or any article of

food stuff other than bread to be sold in prescribed quantities only.
in this State or city?

127 Mr. CASSELS: Meats.

Mr. RUBENS: I don't know of any prescribed weight that you can only buy one pound or two pounds of meat, or three pounds of meat. Is there such a thing in this city outside of the subject of bread?

Mr. CASSELS: Of course there is no other like bread in the city.

Mr. RUBENS: You admit that is the only thing. Then we can shorten all of this examination.

Mr. CASSELS: I don't admit that.

Mr. RUBENS: You don't. So there is something.

Mr. CASSELS: I don't know of anything.

Mr. RUBENS: Oh, you don't know of anything.

Mr. CASSELS: I don't know of any other article that is just like bread; I don't know of any other article that is sold in the same way that bread is.

Mr. RUBENS: Here is a commodity that is sold exactly like bread; it is the article itself, it is in a package; it is all cheese.

The COURT: To Mr. Cassels: You are not willing to admit that?

Mr. CASSELS: I won't admit anything, but I don't know of any law that prescribes any special package.

Mr. RUBENS: Knowing the courtesy that you have shown me on behalf of the City of Chicago, I don't want to put a lot of men on to show that the bulk of food stuffs is not sold according to prescribed weights.

Mr. CASSELS: I will admit that; yes, I will admit that the bulk of food stuffs are not sold in prescribed packages.

Mr. RUBENS: They are sold irrespective of weights; for example like those dates; they are sold irrespective of weights.

Mr. CASSELS: We can't admit that; what we do say is that when goods are sent here in original packages they are sold like that. We are willing to admit that all other things that come in by bulk are sold by the quart or by the pound or by liquid or dry measure.

128 I don't say that there is any law that requires a man to buy only a quart of milk or only two quarts.

Mr. RUBENS: Or one pound of meat or cheese, that cheese is required to be sold only in one or two pounds; that bread is the only thing in this State in the line of foodstuffs is the only thing that is required to be sold according to specified weights; if you will admit that.

The COURT: Do you admit that, Mr Cassels?

Mr. CASSELS: I am willing to say this, that I know of no law or ordinance that prescribed that any commodity shall be sold in packages of a certain size. Of course the reason for that is that the statutes of this state do not give to the cities power to regulate the size of the package of uneeda biscuit or of cheese.

Mr. RUBENS: Oh, yes, you have got the power to regulate the sale of almost everything in your city charter.

Mr. CASSELS: We cannot regulate the weights; the city sealer has that power.

Mr. RUBENS: To examine the scales and see that they are correct.

Mr. CASSELS: Examine the scales and see that they give full weight; that is, meat must be sold by certain weight.

Mr. RUBENS: No.

Mr. CASSELS: Article 3, chapter 38. What I do say is this, that the legislature gave to the city specific power to establish the weight of a loaf of bread.

Mr. RUBENS: I want to call your Honor's attention to the fact that this ordinance is radically different from the old ordinance, the old ordinance that was under investigation in your Honor's court, the ordinance which permitted bread to be sold in any sized loaf provided the weight was marked upon the loaf. This ordinance,
129 in contradistinction to the old ordinance, prohibits the sale of bread, except in certain loaves of the prescribed weights. Now, the question is: Isn't this entirely different? Hasn't this one foodstuff bread been singled out from the great mass of food stuffs and from all the other commodities subject to trade and commerce in the City of Chicago and alone been imposed with the burden of being sold in certain prescribed sizes? Now that is the only question. Now, if that is admitted, that this is the only one, that there is no ordinance applicable to any other thing except bread, then I will not call a dozen more witnesses who I believe are in this court room.

Mr. CASSELS: There is no difficulty about that, if your Honor please, we can get together on that agreement.

The COURT: Get together and agree then, it is time to adjourn.

Mr. CASSELS: We will have to agree right on the record.

The COURT: Of course, if you gentlemen can't agree I have got to go right on and hear the evidence. See if you can't agree and I will adjourn until two o'clock.

A recess was here taken until 2.00 o'clock P. M.

2 O'CLOCK P. M., MONDAY, *May* 23, 1908.

Court reconvenes pursuant to recess.

Mr. RUBENS: I will ask the stenographer to read to the Court the stipulation Mr. Cassels and I have entered into during the noon recess.

(Said stipulation was thereupon read to the Court in words and figures as follows, to-wit:)

"It is hereby stipulated by and between the parties to this suit in open court, that according to the usages and customs of trade and commerce prevailing in the State of Illinois, or in the City of Chicago
130 at no time prior to or subsequent to the time when the ordinance set forth in the declaration filed in this case went into force was there any article of food stuff or any other commodity whatsoever contracted for, bargained or sold according to any definite weight, size or measurement, and that the ordinance pleaded in this case is the only ordinance of the City of Chicago requiring any food stuff or any other commodity or article of commerce whatsoever to be sold according to definite weights only."

Mr. CASSELS: Although there are many commodities and foodstuffs in the City of Chicago required to be sold by weight or measure.

Mr. RUBENS: I don't agree to it, because if there is any ordinance of the City of Chicago which requires them to be sold only by weight or measure I claim it is not a valid ordinance, and that will be more apparent to your Honor when I come to argue this case.

Mr. CASSELS: That is the fact.

Mr. RUBENS: That does not interfere with the truth of this stipulation. There is no ordinance which requires an article to be sold by definite weights, no law which requires alcohol to be sold in one quart or 2 quarts or one gallon or 2 gallons. You are not required to sell wheat in 5-0, 100 or 200 bushels and you are not required to sell meat only in one, two, three, or four pound pieces. Nothing of that kind in the State. That is true, isn't it?

Mr. CASSELS: That is true.

Mr. RUBENS: That is all that this stipulation says. We all know that there is a law or a statute which says that in the absence of a statute to the contrary, if a bargain is made for a barrel of flour, that it shall be supposed to contain so many bushels, and so you have some ordinances of the City of Chicago but there is no private
131 ordinance or any statute of the State which says that you shall have any commodity sold by prescribed weights or measurements. That is what we have stipulated.

Mr. CASSELS: Do you object to adding there that there are several commodities which the City of Chicago requires to be sold by weight?

Mr. RUBENS: I will tell you what I am perfectly willing to do——

The COURT: By such an admission you don't admit that validity?

Mr. CASSELS: No, he does not.

Mr. RUBENS: No, if you have any ordinances, offer them subject to the objection and let them go into the record. You can do that at your leisure. Pick out your ordinance and let them go in. I am perfectly willing.

Mr. CASSELS: That would incumber the record too much.

Mr. RUBENS: There can't be many. I claim there cannot be any valid ordinance, no valid enactment of that kind, but if you have any offer them.

Mr. CASSELS: This testimony that has been offered as to these various commodities stands in the record does it not?

Mr. RUBENS: Yes.

Mr. CASSELS: That shows practically what I am asking for. That is not withdrawn?

Mr. RUBENS: No.

The COURT: Have you any further testimony?

Mr. RUBENS: Yes.

The COURT: Go ahead. If we take up much more time we will not have time for the arguments.

Mr. RUBENS: I shall be as brief as I can.

WILLIAM E. HABEL, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

132 Direct examination.

By Mr. RUBENS:

Q. What is your name?
A. William E. Habel.
Q. What is your business?
A. Salesman.
Q. Salesman of what?
A. Flour.
Q. In your business as salesman of flour do you visit the bakeries of the City of Chicago?
A. Yes sir.
Q. Have you done so in the course of the last five or ten years?
A. For 13 years.
Q. Your business brings you habitually, almost daily to the various bakeries of the City of Chicago which are selling loaf bread?
A. Yes sir.
Q. And because of such visits and of your business as salesman of flour to bakeries, have you had an opportunity of observing the sizes of loaves which are in the ordinary course of business traded in in bakeshops and in the grocery stores of the City of Chicago?
A. Yes sir.
Q. Look at this loaf of bread which I hold in my hand now and state whether or not that is a loaf of bread which is sold and baked in the ordinary course of business by the bakeshops in the City of Chicago?
A. Yes sir.

The COURT: Let the record show the weight.

Mr. RUBENS:

Q. Do you know the weight of this loaf of bread. (Indicating Exhibit S.)
A. I think it is 13 pounds or 12.
Q. You are sure it is over 10 pounds?
A. Yes sir.
Q. Will you look and see if there is any doubt about it?

Mr. CASSELS: Yes.
Mr. RUBENS: It is between 12 and 13?
Mr. CASSELS: Yes.

Mr. RUBENS:

Q. Have you had opportunity of observing whether loaves of bread of that size are sold in these bakeshops in the ordinary course of business daily?
A. Yes sir; in certain localities.

Mr. RUBENS: That is all; take the witness.

133 Cross-examination.

By Mr. CASSELS:

Q. Do you know what kind of bread that is? (Indicating Exhibit 8.)
A. Yes sir.
Q. That is what is ordinarily called pumpernickel; have you ever seen pumpernickel bread in loaves smaller than this?
A. Yes.
Q. What size?
A. Pound and two pound loaves.
Q. Have you ever seen pumpernickel bread actually sold in the City?
A. Yes.
Q. Have you ever seen the loaves cut up?
A. Yes.
Q. I will ask you this. You say in certain localities this bread is commonly sold; what localities?
A. Mostly Polish.
Q. In other parts of the City of Chicago it is not sold at all?
A. No sir.
Q. In the larger part of the city it is not sold at all?
A. No, not in the larger part.
Q. I mean in more than three-quarters of the City of Chicago such bread is not sold?
A. Such bread as that, in those sizes are sold mostly in localities that I have mentioned, in Polish localities.
Q. Which localities comprise only a small part of the population of Chicago?
A. I don't know, there is a pretty big population of Polish people here.
Q. The population of Polish districts where that bread is sold ordinarily?
A. Probably one-twenty-fifth.
Q. I mean as to the people living there?
A. One-twenty-fifth of the people living there.

Mr. RUBENS:

Q. Of the city?
A. Yes.
Q. 100,000?
A. Yes.
Q. Or 50,000 or 80,000 anyway?
A. Yes.

134 Mr. CASSELS:

Q. How many years have you observed the sale of bread in Chicago?
A. About 15.
Q. Have you ever observed that bread is sold otherwise than in the loaf?

A. Yes.
Q. How is it sold?
A. Those loaves are cut up sometimes and sold in pieces.
Q. That is, they are sold in loaves or pieces of loaves?
A. Yes.

Mr. CASSELS: That is all.

Redirect examination.

By Mr. RUBENS:

Q. Do you know the object of making these large loaves?
A. Yes.
Q. What is it?
A. The object is to give a better loaf of bread; the people prefer not to have so much crust, and the bread keeps moister in larger pieces like that than it does in smaller pieces.

Recross examination.

By Mr. CASSELS:

Q. In the same store where a loaf of this size is sold there are loaves of the same kind of bread of smaller size?
A. Not of the same kind; of different kinds.
Q. Of pumpernickel bread?
A. Yes, in some places they do have smaller loaves.
Q. They have smaller ones than this? (Indicating Exhibit S.)
A. Yes.
Q. Isn't this one of the largest loaves you have ever seen?
A. It is one of the largest, yes.
Q. It is an extra or extreme size, is it not?
A. Yes.
Q. Are there many of these sizes?
A. There is one store that takes as high as 30 or 40 loaves of that size every day.
1357 Q. Would you find more of this size than you do of the smaller sizes, say around 5 or 6 pounds?
A. Oh, no.
Q. There are a great many more of the 6 pound loaves, aren't there?
A. Yes sir.

Mr. RUBENS: That is all. Now, I could narrow down the limit of this testimony very much if I knew as to whether some of this cannot be admitted.

Mr. CASSELS: We are not going to controvert the greater part of this testimony.

Mr. RUBENS: Because there is no use, for the sake of this argument of piling Pelion upon Ossa and bringing on a lot of witnesses. For example, my points, what I want to bring out is this.

First. That the bakery business is in no way a monopoly, not affecting the public interest; that it is is not a business in which there is no competition. It is in competition with the ordinary cook stoves of the ordinary household.

Second. That there is no possibility of exactly measuring the weight of bread as it leaves the oven.

Third. That there is no possibility of exactly determining the shrinkage in the weight of bread, because that shrinkage is dependent, even as long as anybody will call the bread fresh bread, upon temperature, moisture, mode of keeping, quality of bread, size of loaf, etc.

Fourth. That there is no such thing as bread that is commonly called stale bread, because there is no consensus of opinion in the trade, or otherwise, as to when a certain loaf of bread is stale bread.

Now if the evidence is to go in unchallenged as to all these points I have made then I will not call any more witnesses. It is
136 all true, as counsel knows, but the question is whether he wants more witnesses. If it is to be contradicted at all I have a roomful of witnesses.

Mr. CASSELS: Have you covered all the points that you designed to cover by these various witnesses?

Mr. REUBENS: Practically I think, except one thing; I have not covered yet what I am going to cover by the next witness which I will call, and that is that in the ordinary course of business in the City of Chicago, bread is required to be baked in certain sizes which cannot possibly conform to the requirements of the ordinance. That of course I am not going to ask this witness about, but there is another witness for that purpose, but on the other points which are undoubtedly as I have stated them I don't think we want to call more witnesses, unless it is contradicted.

Mr. CASSELS: If your Honor please, our position is this: I think the testimony introduced, if it has any materiality at all is practically correct. We may call a witness on the question of the possibility of scaling a loaf more accurately. I think the difficulty perhaps was slightly exaggerated, the difficulty of scaling a loaf. We shall also want to call witnesses to state the actual weight of bread as they found it in the City of Chicago.

Mr. REUBENS: Then I have got to go to the scaling part of it Your Honor, and it will be a question of the weight of evidence in the mind of the Court, whether I produce a greater impression upon the mind of court as to the possibility of scaling exactly or whether your witness will. Now then I am going to ask Mr. Schulze as to that. It seems to be admitted in all the literature I have seen, and I think I have read everything that is in print in the English language and almost everything in print in every other, that it is almost impossible to scale it exactly.

137 Mr. CASSELS: If your Honor please, we admit that, that it is impossible to scale exactly, as the wording of the ordinance means. The intention of the city I think is this, so far as the law requires us to go, and that is that it is possible to scale bread so that it will weigh at least a pound or any other weight that is desired to be made by the baker.

Mr. REUBENS: Will you admit, per example, that if you put six ounces in that it will weigh six ounces, no matter how it is scaled or how it is cut?

Mr. CASSELS: The only point is this: There is a margin of safety upon which we agree; that is the only point. I am not sure that I shall call a witness.

Mr. RUBENS: There are certain points upon which I think there ought not to be any disagreement between the City of Chicago, which has no private interest, and these parties, who have a large private interest. They are manufacturers.

The COURT: You have heard what counsel says, that he is going to call witnesses.

Mr. RUBENS: Yes.

Mr. CASSELS: That is my intention now unless something further comes out.

WILLIAM SCHULZE, a witness called on behalf of the defendant having been first duly sworn testified as follows:

Direct examination by Mr. RUBENS:

Q. What is your name?
A. William Schulze.
Q. Are you an official of the Schulze Baking Company?
A. Yes.
Q. What is your position with the firm?
A. Treasurer.
Q. Are you in charge of any particular branch of the business of the William Schulze Baking Company business?
A. Yes; I have charge of the bake shops.
138 Q. You are the man then who really has charge of the manufacture of bread in that factory?
A. Yes.
Q. How large a bread factory is the Schulze factory as to the output of bread per day, say within the last six months, on an average, how many loaves of bread per day on the average?
A. Gross sale, between 50,000 and 60,000 a day.
Q. Between fifty and sixty thousand loaves of bread a day?
A. Yes.
Q. Now, I will ask you with reference to the sealing of bread, that is, determining the weight of the dough before the fermentation sets in, because I understand its weight is established or what is called sealed off before the fermentation sets in?
A. No sir, during the fermentation.
Q. Then after the fermentation has begun and gone a certain distance then you do what?
A. We scale it off.
Q. That is you weigh it?
A. Yes.
Q. You divide these large portions of bread dough into small pieces of bread dough as it is to be baked?
A. Yes.
Q. How is that done?
A. Two different ways.
Q. Tell us how.

A. By hand also by machine.

Q. Which is the usual method of scaling?

A. By hand.

Q. Which is the method prevailing in your establishment?

A. Mostly by hand and partly by machinery.

Q. Now, let us come down to the scaling off by hand—by the way, how long have you been a bread baker in charge of the operations of a large bakery?

A. 15 years.

Q. I will ask you, from your experience as such a practical baker, in charge of the operations of such a bakery, whether in your opinion it is possible to scale off the bread exactly?

A. No sir.

Q. Will you tell us why not. Let us come first to the hand scaling.

Q. There is one man——

1339 The COURT: I understand counsel to concede that it cannot be done exactly.

Mr. CASSELS: It is only a question of the margin, if your Honor please.

Mr. RUBENS:

Q. It being conceded that it cannot be done exactly, what is the difference in margin that in your experience exists in the scaling off?

A. About half an ounce, three-quarters of an ounce, at times perhaps an ounce.

Q. To a pound loaf of bread?

A. Yes.

Q. Now, with reference to the baking of the bread itself, which is the prevailing kind of oven in the bakeries of Chicago, especially the larger bakeries?

A. The Peel oven.

Q. Are there many other ovens than the Peel oven in actual operation in the bakeries in the City of Chicago?

A. Very few.

Q. More than 12, per example, out of the 800 or 1000 or 1500 bakeries?

A. I don't think so.

Q. How many Peel ovens have you in your establishment?

A. Twenty-three.

Q. How many ovens of other kinds?

A. None.

Q. Your bakery is about the largest bakery in the City of Chicago?

A. I think so.

Q. There is none substantially larger than yours?

A. No sir.

Q. Now with reference to the baking of the bread, isn't it true that if dough is ever so carefully scaled off before it goes into the Peel oven, that when it comes out one loaf will not weigh exactly as much as the other loaf?

A. Yes.

140 Q. Why is it?

A. On account of the baking.

Q. Explain to the Judge here?

A. The temperature of the ovens is not always the same and even if you use the same oven the first batch of bread that is baked in the oven during the day will never turn out the same as the last batch out of the very same oven, and the bread which is sealed particularly on a very exact scale and that bread is taken care of properly will not weigh the same when it goes into the oven.

Q. Because of the different degrees of temperature in the oven itself?

A. In the oven itself.

Q. And also because of the fact that the same bread itself will necessarily have to be exposed to the heat of the oven longer than other bread?

A. Yes.

Q. Now I will ask you, Mr. Schulze, from your experience whether there is a shrinkage in the bread after it leaves the oven as completely baked bread?

A. Yes sir.

Q. Have you made any actual examinations and tests as to the amount of shrinkage?

A. Yes, sir. I have.

Q. Will you please tell the Court whether that shrinkage is in a measure or is it not in a measure dependent upon the quality of the bread, the size of the loaf, the temperature of the day, the temperature of the place in which it is kept, the atmospheric conditions, the dryness or absence of dryness in the place in which it is kept, or other things?

A. Yes sir.

Q. Have you made any tests with reference to the shrinkage of the same kind of bread after it leaves the oven?

A. Yes sir.

Q. Will you please now testify and tell his Honor what the result of those actual tests was.

A. I have sealed——

Q. Are these the three loaves which you tested (indicating exhibits W and X)?

141 A. Yes sir. One of them a single loaf and the other two a double loaf, baked together in one pan.

Q. The single loaf is a loaf which has a crust all around?

A. Yes sir.

Q. On all six sides?

A. Yes sir.

Q. The double loaf is a loaf which has only a crust on five sides and where the two loaves stuck together there is no crust. Is the evaporation in the loaf which has no crust on one side higher in a given temperature and under the same circumstances as in a loaf which has a crust all around?

A. It is less.

Q. It is less?
A. Yes.
Q. Why?
A. Because it is a larger value and there is more moisture in that loaf than there is in the other.
Q. You mean as long as they are together?
A. There is more moisture in those loaves than there is in a single loaf.
Q. Because the one side was not exposed so much to the heat?
A. Yes sir.
Q. And in the other case all of the six sides were exposed to the heat?
A. Yes sir.
Q. What is the result of your actual test?
A. Those two loaves there that were baked together were scaled 31 ounces in the baking; in other words, each loaf was scaled 15 ounces and a half.

Mr. CASSELS:

Q. Fifteen ounces and a half of dough?
A. Of dough.

Mr. RUBENS:

Q. Of dough in the process of fermentation.
A. Then after a certain process of fermentation it was put in the oven and after it came out of the oven those two loaves only weighed 24¼ ounces.
Q. Then what happened; then when did you weigh them next?
A. Then I weighed them again——
Q. What time of day or night was that?
A. The bread came out of the oven at 11.30 P. M. We
142 weighed it again at 1.40 A. M. and they scaled 27½ ounces. They were weighed again at 5.30 and they weighed 27¼ ounces; they were weighed again at nine o'clock and they weighed 27 ounces. They were weighed again at 12 o'clock and they weighed 26⅞ at three o'clock 26¾ and at seven o'clock 26⅝. At one o'clock midnight, the following day, 26⅜; at 8.30 26 ounces, at five P. M. 25½ ounces and this morning they only weighed 23 ounces.
Q. This same bread.
A. This same bread.
Q. Those are the two loaves (indicating)?
A. The two loaves.

Mr. RUBENS: I offer these loaves in evidence.

Said loaves of bread were thereupon received in evidence as defendant's Exhibits W and X respectively, photographs of which are as follows, to-wit:

Defendant's Exhibit W.

Defendant's Exhibit X.

143 The COURT:

Q. When were they baked? When were they taken from the oven?

A. They were taken from the oven on the 20th day of May at 11.30 P. M.

Mr. RUBENS:

Q. Were they kept in the same place all the time?
A. No sir.
Q. Where were they?
A. The first thirty-six hours they were kept in a closet, the same as a bread case in a store.
Q. The first 36 hours?
A. Yes.
Q. They were kept in the same place?
A. Yes.
Q. Was that a dry place or a moist place?
A. Moist place.
Q. In a moist place.
A. Yes sir.
Q. Not very hot, not exposed to the heat?
A. Ordinary temperature.
Q. Ordinary atmospheric temperature?
A. Atmospheric temperature.
Q. Then after the 36 hours had expired what become of those two loaves? Indicating Exhibit W.
A. I took them down town to our down town office and kept them in the vault.
Q. In the vault in your office?
A. Yes.
Q. Is that a dry and dark place?
A. Yes.
Q. It is not exposed to the rays of the sun?
A. No sir.
Q. Have you made any other tests with reference to the shrinkage in the weight of a loaf of bread that you actually made yourself?

A. I have, that other loaf there; that single loaf indicating Exhibit X.

Q. That is the single loaf that has crust on all six sides?

A. Yes.

Q. Tell us the results of your actual tests with it.

A. That loaf was sealed 16 ounces in the baking and weighed 14½ ounces out of the oven; at 1.40, 14¼; at 5.30, 14

144 ounces; at nine o'clock 13⅞ ounces, at 12 o'clock 13⅞; at 3 P. M. 13½ ounces, at seven 13¼ ounces at one A. M. on the 22nd, 13 ounces, at 8.30 12⅞, at 5 P. M. 12¾, and this morning 11⅞.

Q. Mr. Schulze, according to your experience as a practical baker doing business in the City of Chicago is there any established custom of trade with reference to the time that will have to elapse between the baking of a loaf of bread and the time when it is by general custom called stale bread?

A. No sir.

Q. How does it come that there is no such general custom or usage?

A. There is so much difference of opinion.

Q. Are there no other reasons why the time cannot be definitely fixed before it is called by some people stale bread or other people stale bread; does the quality of the bread or the flour or other ingredients used, or the size of the loaves have any bearing upon the question?

A. Yes.

Q. In what way, Mr. Schulze, as to the size, per example?

A. The large size will not evaporate so quickly; it contains more moisture and carries the moisture longer than a small loaf will.

Q. I will ask you as a practical baker, from your experience, whether if the dough has been carefully sealed off, and two pieces of dough weighing exactly alike are put into the oven and when they come out from the oven, because of the difference of the heat in the particular part of the oven in which they are baked, and the longer time that the one was exposed to the heat than the other, whether the shorter weight loaf contains just as much nutriment as the heavier weight loaf?

A. It does.

145 Q. The difference is only in the water?

A. In the evaporation of the water, yes sir.

Q. The fact that one loaf weighs less than another loaf does not in itself say that there is less nutriment in the one loaf than in the other loaf?

A. No.

Q. Isn't it a fact that the question of the amount of nutriment which is in a loaf of bread is dependent largely upon the quality of the flour that is used in making the loaf?

A. The quality of the flour and the other ingredients.

Q. In other words, when one tells you that he has eaten a pound and a half of bread and the other man says he has eaten a pound of bread you can't tell which one has received the greatest amount

of nutriment, unless you know all about the quality and ingredients of the respective loaves of bread?

A. No sir.

Cross-examination.

By Mr. CASSELS:

Q. Referring to the test of this single loaf of bread when was this taken from the oven?

A. At 11.30.

Q. What day?

A. On the 20th of May.

The COURT: 11.30 A. M.?

Mr. RUBENS: P. M.

A. 11.30 P. M.

Mr. CASSELS:

Q. On the 20th of May?

A. On the 20th of May yes sir.

Q. 11.30 P. M. on the 20th of May. Will you tell us what your figures show in weight on or about 12 hours after that time?

A. That will be 12 o'clock noon the following day; 12 o'clock at noon, that loaf scaled 13¾.

Mr. RUBENS:

Q. How much did it scale when it came out?

A. 14½.

Mr. CASSELS:

Q. 14½ when it came out?

A. Yes.

Q. 13½ when?

A. 12 hours 13¾.

146 Mr. RUBENS: A loss of three quarters.

Mr. CASSELS:

Q. At the end of 13 hours what does your test show?

A. 13 ounces which one hour past 12.

Q. Yes.

A. 13 ounces.

Q. How much did you say it weighed today?

A. 11⅞.

Q. I will ask you if this is stale bread in your opinion.

A. That is stale bread.

Q. There is no doubt about it?

A. There is no doubt about it.

Mr. RUBENS: That is 4 or 5 days after it is baked.

Mr. CASSELS: We will come back to that in a minute.

Q. Now, these two loaves which you have tested, will you tell how much they weighed as they were drawn from the ovens?

Mr. Rubens: He testified as to that.
A. 28¼.

Mr. Cassels:

Q. How much did they weigh 24 hours after that, as near as you have it?
A. 26⅜.
Q. Are these two loaves stale bread?
A. Yes sir. I would like to add to that, those two loaves were scaled half an ounce less in the dough, and they now scale ⅜ of an ounce more, 24 hours after they left the oven.
Q. Are these loaves of the same quality, the whole three?
A. Yes sir.
Q. The same flour?
A. The same flour, the same dough, the same quality?
The Court: I would like to know more about that, you say they weigh more after they come out of there?
A. They weigh more; they are weighing more now; they were scales less ½ an ounce each loaf than the single loaf and they weigh more than it, they have not evaporated as much as the single loaf, on account of being a double loaf.

Mr. Rubens:

Q. In proportion?
A. In proportion.

Mr. Cassels:

Q. When were these first broken apart?
A. Saturday.
Q. The 23rd?
147 Mr. Rubens: The 23rd, yes.
Mr. Cassels: Three days after.
Q. And from that time on the evaporation would go on very much faster, would it not?
A. I suppose so, yes; unless they were put together again the same as they were before.
Q. Were they put together?
A. I could not say as to that.
Q. You didn't watch them to see?
A. No.
Q. You say you are sure these three loaves are stale bread?
A. Yes, I would judge them stale bread.
Q. Were they stale bread yesterday?
A. Yes, I would say so.
Q. On the 24th. Were they stale bread Saturday in your opinion, I am asking you.
A. I would say yes.
Q. Were they stale bread Friday?
A. Not necessarily.
Q. Might they have been stale bread?
A. Some people might call them stale.

Q. Would you have called them stale?
A. I don't think so.
Q. That is three days after they were baked?
A. Two days.
Q. Two days after they were baked?
A. Yes.
Q. You know, as a matter of fact, that great quantities of stale bread are sold in Chicago, do you not?
A. Yes sir.
Q. And bread of this character, that is, after it has dried out and kept a while, is commonly called stale bread?
A. Yes sir.
Q. The only question in your mind is as to the exact moment when it becomes stale bread?
A. Yes.
Q. Now with reference to the scaling of the dough is it not possible by carefully scaling, to so scale the dough that the loaves of bread will weigh at least as much as any certain figure that you set for instance, a pound?
A. I would not be positive about it.
Q. Isn't it possible to do it.
A. It is possible, yes sir, if you give enough weight into the chunk to be on the sure side in any case.
148 Q. In other words it is possible by giving a little more dough or a little less, as the case may be, to make sure that the picked loaf will weigh at a certain time——

Mr. RUBENS: At what time?
Mr. CASSELS: When it is taken from the oven.

A. They will not be the same weight, though.
Q. I am not asking that. But isn't it possible for example to make sure by your scaling of the dough that every loaf that comes out of th oven will weigh at least one pound?
A. If you scale 20 ounces in the dough, you might yes, I would say you would be safe in doing it.
Q. If you give 20 ounces?
A. Yes.
Q. Do you make any pound loaves in your bakery?
A. Not at the present time.
Q. Do you make Butternut bread?
A. Yes.
Q. What is the weight of Butternut bread?
A. We scale that 16 ounces in the dough.
Q. How much does the baked loaf weigh, when it is first taken from the oven?
A. Just as you had here, 14½ ounces.
Q. In other words, the scaling at 15 ounces will give you a loaf weighing 14½ ounces?
A. Yes sir.
Q. Would it be necessary to allow as much as 4 ounces in the scaling of the dough?

A. In the whole run of it, yes, because I took particular pains to scale these loaves off and pinched off as much as was necessary and added as much to it to have exactly 16 ounces on the scale.

Q. I want to ask you if the difference in the weight of the loaf is not done by careless scaling when it is to be done by hand?

A. It is hardly possible to be correct.

Q. You mean by that absolutely accurate?

A. Absolutely accurate.

Q. Isn't it possible to approach accuracy, so as to make it exactly as you want to make it, if you are scaling 16 ounces, can't you make it 16 ounces right along, more or less?

149 A. More or less.

Q. With the variation of half an ounce?

A. Half an ounce, or three quarters of an ounce at times.

Q. It is possible to do that?

A. But there are loaves weighing exceedingly less; others weighing exceedingly more. In other words, after a piece of dough has been cut off to weigh a pound and it only weighs within a little piece of that, the baker will add a little piece and take away a little piece, and when he throws it off of the scale it will get attached to the other loaf of bread.

Q. That is an accident.

The COURT:

Q. Is that an accident?

A. Those accidents will happen very frequently.

Mr. CASSELS:

Q. When you say that you must allow a margin of four ounces on the dough, you mean to make yourself absolutely sure, do you not?

A. Absolutely sure.

Q. To make it so that one out of one hundred would be absolutely correct, couldn't you scale your dough less?

A. Not much less.

Q. How much less?

A. Probably one ounce.

Q. You know how bread is scaled in Chicago?

A. Yes.

Q. All bread is made in loaves?

A. Yes.

Mr. RUBENS: All bread is made in loaves.

The WITNESS: Of certain shapes.

Mr. CASSELS:

Q. There is no other way of putting bread on the market?

Mr. RUBENS: Isn't there other bread sold in the form of crackers and biscuits?

Mr. CASSELS: We are not speaking of crackers.

Mr. RUBENS: That is bread. You mean all loaf bread. All loaf bread is sold in loaves, of course.

150 Mr. CASSELS:

Q. That which is commonly called bread is sold in loaves is it not, such as we have here?

A. Yes sir.

Q. In your bakery how many different kinds of bread are you making?

A. I could not exactly give you a figure.

Mr. REBENS:

Q. About?

A. About 20 different kinds or twenty-five.

Mr. CASSELS:

Q. You say the ordinary loaf of Butternut bread weighs 14½ ounces when it leaves the oven?

A. Yes.

Q. If you know that you scale higher than that?

A. Yes.

Q. What for instance?

A. Scale some of it 19 ounces.

Q. What kind do you scale 19 ounces?

A. Rye bread.

Q. And how much does the loaf weigh when it is——

A. I made a test of that also; it came out of the oven and scaled 16¾.

Q. How much did the dough scale?

A. 19 ounces.

Q. If you scaled 19 ounces of wheat flour would the loaf come out in the same way, 19 ounces?

A. In the general run it might.

Q. Isn't it a common rule, generally accepted among bakers that for bread weighing approximately a pound it is necessary to scale the dough so that you will have two ounces more of dough than you expect to have the bread; in other words, don't you scale a pound loaf at 18 ounces; isn't that the ordinary rule among bakers?

A. No.

Q. Isn't that generally understood to be about the proportion?

A. No, I don't think so.

Q. What is the rule?

A. We scale ours 18½, when we figure on getting a pound out of it.

Q. You say that the rule is 18½ or 2½ more?

A. In our shop.

Q. In your shop?

A. In our shop.

Q. You don't know what the others do?

A. I don't know.

Q. It might well be might it not that dough scaled at 18 ounces would turn out 16 ounces when the bread is withdrawn from the oven?

A. Certain doughs will.

Q. And others might more than that?
A. Certain doughs will. It depends altogether on the amount of flour that you put into it.

151 Q. These tests, where were these loaves kept for 24 hours immediately succeeding their withdrawal from the oven?
A. In a cupboard.
Q. Where?
A. At our bakery.
Q. What part of the bakery?
A. In the shipping room.
Q. Any heat there?
A. No sir.
Q. When was this last week you say?
A. Yes. Under ordinary temperature, away from the shop.

Redirect examination.

By Mr. Rubens:

Q. Do I understand you to say that there can be no definite rule with reference to the weight of the dough that you have to scale off, because it depends altogether on the quality of the bread, the quality of the flour, and the kind of mixture, such as lard, butter and eggs that goes in; there is no definite rule as to that?
A. No definite rule.
Q. You do, as a matter of fact, sell bread for 5 cents that weighs to exceed a pound loaf?
A. Yes.
Q. And you sell other breads at less than five cents?
A. Yes.
Q. Why that difference?
A. The bread that we scale in the loaf that exceeds 19 ounces, does not cost any more than the short weight on the other bread.
Q. The difference between breadcloth and homespun; it is a difference of quality?
A. Yes.
Q. You can give more of a poorer quality than of a richer quality?
A. Yes.

Recross-examination.

By Mr. Cassels:

Q. And you say there is no definite rule about scaling dough with reference to the size of the loaf desired; do I understand you to say that?
A. Yes.

152 Q. Just what do you mean by that?
A. That we are scaling some 19 ounces, some 17 ounces and some 15½ ounces.
Q. But you don't expect the loaves to come out the same way. What I want to get at is this: when you desire in your bakery to bake a loaf of bread that when baked it will weigh some 19 ounces, is there some rule by which you scale that output?

A. Yes, there is. That was not the question.
Q. What is the rule?
A. We add so much more to it?
Q. How much?
A. There is no particular rule.
Q. Take it as to this bread that has been offered in evidence, the Pandandy bread.
A. We are scaling that 15 ounces and a half.
Q. What sized loaf?
A. There is no particular size for it.
Q. How much does it weigh when it comes out of the oven?
A. I gave you that testimony before; two loaves weighed 28¼ ounces.
Q. That is 14⅛ ounces?
A. Yes.

REINHOLD REICHARD, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RUBENS:

Q. Give us your full name?
A. Reinhold Reichard.
Q. Are you in the bakery business in the City of Chicago?
A. Yes.
Q. For what length of time have you been engaged in the bakery business in the City of Chicago?
A. About 16 years.
Q. You are still in that business?
A. Yes.
Q. And have been engaged in that business continuously for 16 years?
A. Continuously so.
Q. Your trade is in the City of Chicago?
A. Right here in the heart of the city.
Q. Do you make a specialty of supplying a certain class of customers?
A. We do.
153 Q. What is the class of customers which you largely supply?
A. We supply restaurants, cafés and lunch rooms with bread.
Q. I will ask you whether, according to the established custom and usage of your trade, bread is sold to your customers by weight or otherwise?
A. It is being sold by the loaf.
Q. Loaves of any particular shape?
A. According to the wishes of the party. That is some parties desire a larger sized loaf than others.
Q. Is it a fact or is it not a fact that the exigences with reference to the size, the length, the height, the width of the loaves vary among your customers?

A. They do.

Q. And that they contract with you with reference to particular shapes and sizes of loaves?

A. Yes sir.

Q. Isn't that the ordinary way in which your business is carried on?

A. It is.

Q. Tell me what is the average daily output of your bakery, supplying that class of trade, about?

A. About 7,000 loaves.

Q. 7000 loaves a day?

A. Yes.

Q. Now will you tell me whether any of that bread has ever been sold and is sold now to your trade by weight?

A. It has not.

Q. It is sold exclusively according to the shapes of the loaves?

A. Shapes, yes.

Q. Have those loaves any particular names?

A. We have regular names for the different kinds of shapes that we make.

Q. Will you tell us what those names are?

A. We have, for instance, keystone, that is a square loaf which weighs possibly an ounce less than 2 pounds.

Q. In other words, you have a demand among your customers for bread of a certain shape, which, when it comes out of the oven weighs about 31 ounces?

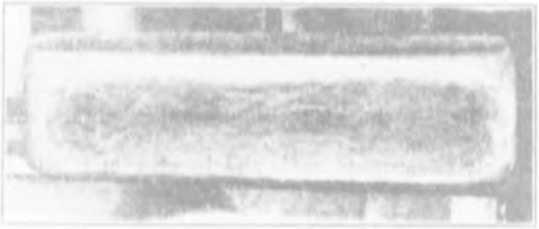
A. 31 ounces.

154 Q. Which is the keystone bread.

A. It is back there, I guess, he is just bringing it.

Mr. REYNES. I now offer this loaf of bread in evidence.

Said loaf of bread was thereupon received in evidence, marked defendant's Exhibit Y, a photograph of which said loaf is as follows, to-wit:



Defendant's Exhibit Y.

Q. I will hand you this loaf of bread, the keystone bread, and ask you whether your customers demand a loaf of exactly that size or not?

A. They do.

Q. Will you give us a reason or explain to us and to his Honor

the Judge, here why they want that kind of a loaf of that particular size.

Mr. CASSELS. Is the witness qualified, Mr. Rubens, to testify to that?

Mr. RUBENS. Why, he is contracting every day for the sale of his output.

Mr. CASSELS. I should think that would be immaterial, if your Honor please.

Mr. RUBENS. How can that be immaterial, if your Honor please?

The COURT. I will hear it subject to the objection.

A. The different localities, even have something to do with it. That is, these loaves are usually cut up into sandwiches. This particular loaf is supposed to contain about 17 sandwiches. That is they cut them up into 17 double sandwiches, 17 double slices, all loaves being made for the same purpose practically.

153 Mr. RUBENS.

Q. What was the weight of that loaf when it came out of the oven?

A. Two pounds and three ounces in the dough, and about an ounce less than 2 pounds baked.

Q. Baked?

A. Yes.

Q. Is there any particular trade reason why they want just that particular size; why are they not satisfied with one-half of that size?

A. The reason is this, that some restaurants sell their sandwiches for five cents, while others sell them for 15 or 10 or possibly 25, some even higher; we make these larger loaves for that purpose.

Q. That is, for sandwiches, roast beef sandwiches or thinks like that you make a bread like this; what do you call this bread?

A. We call this the Jumbo bread. It is used also for sandwiches.

Q. Of a particular size?

A. Of a particular size.

Q. How much did that weigh when it came out of the oven?

A. That weighed 2 pounds and 6 or 7 ounces; they vary at times.

Q. Between two pounds and 6 or 7 ounces?

A. 6 or 8 ounces.

Q. According to the temperature, the moisture in the atmosphere?

A. Yes.

The COURT:

Q. When it is baked?

A. When it is baked.

Mr. RUBENS:

Q. Isn't this the reason why they want these particular shapes of loaves, that they want as little crust as possible?

A. Yes.

Q. And they want it to fit their cutting machines that they have?

A. Yes.

Q. And that is why they order sizes of a particular kind, so they will have no crust at either end, and cut with the knives right straight through and make their sandwiches?

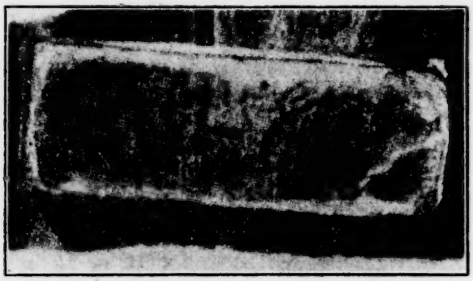
A. Yes.

Q. And according to their custom and trade they require a certain shape, and these are the shapes in which you have been contracting with them for during your course of business,
156 contracting for in the ordinary course of business, with the restaurant trade in the City of Chicago? Isn't that it?

A. It is.

Mr. RUBENS: I offer this Jumbo bread in evidence.

Said bread was thereupon received in evidence, marked defendant's Exhibit Z, a photograph of which said loaf is as follows, to-wit:



Defendant's Exhibit Z.

Mr. RUBENS:

Q. I will call your attention to this loaf of bread and ask you what this is (indicating)?

A. This loaf is used by the cheaper class of bread trade on the west side.

The COURT:

Q. What do you call that?

A. We call this hotel bread.

Mr. RUBENS:

Q. That is the trade name of that size, isn't it?

A. Yes. It weighs one pound and 8 ounces.

Q. Have you got a constant and daily demand for bread weighing exactly or about that much for bread of that size?

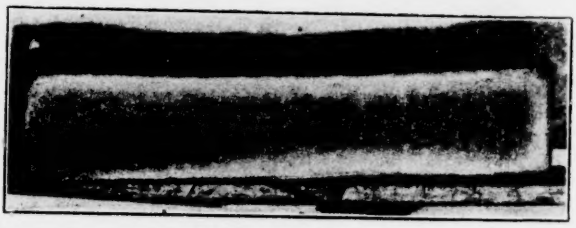
A. We have.

Q. How many loaves of bread a day have you been selling in the last year or two years on the average per day of bread of that exact size?

A. Of this particular size here, well, this part of it fell off very much possibly seven or eight hundred loaves a day of this kind.

Mr. RUBENS: I offer this hotel bread in evidence.

157 Said loaf of bread was thereupon received in evidence, marked defendant's Exhibit AA, a photograph of which said loaf is as follows, to-wit:



Defendant's Exhibit AA.

Mr. RUBENS:

Q. And of this keystone bread you sell how much a day?
A. About the same, about seven or eight hundred loaves.
Q. And how much of the Jumbo bread?
A. Not so many; those are made especially for two restaurants only, inside of the loop.
Q. Inside of the loop?
A. Yes.
Q. And they want it just that way?
A. Yes.
Q. And that weighs how much?
A. Two pounds and 8 ounces.
Q. They ordered that size?
A. Yes, especially made for two particular cafés.
Q. For two particular restaurants?
A. Yes.
Q. I will ask you to look at this particular loaf of bread, which I will offer in evidence, and tell me what it is called and what it weighed when it came out of the oven?
A. This is graham, weighs one pound, 9 ounces and a half as it came out of the oven.
Q. Have you any considerable number of orders for exactly this size of bread?
A. Not very much; we have possibly four different customers that get this special loaf.
Q. How many loaves of bread do you sell of that on an average?
A. I would judge about 75.
Q. 75 loaves of that Graham bread a day?
A. Yes.

Mr. RUBENS: I ask that this Graham bread which I have offered in evidence be marked as Defendant's Exhibit BB.

158 Said loaf of bread was thereupon received in evidence, marked Defendant's Exhibit BB, a photograph of which said loaf is as follows, to-wit:

Defendant's Exhibit BB.

Mr. RUBENS: Now, I will call your attention to this bread, which I offer in evidence, and ask you to say what it is called and what it weighed when it came from the oven.

A. This we call a special Keystone. Its weight is one pound, 10 ounces and a half, as it came out of the oven.

Q. How many loaves of that do you sell a day, on an average, at this season of the year?

A. About 1000 loaves.

Q. 1000 loaves. Is this a size which has been agreed upon between your customers and yourself?

A. It is.

Q. They want that particular size?

A. They want that particular size.

Q. Is it sold with or without reference to the weight?

A. Without reference to the weight.

Q. It is the size and the shape of the loaf that is in demand?

A. Shape of the loaf.

Q. They want that particular bread for their particular purposes?

A. They do.

Q. Isn't it a fact that for this restaurant trade the important part of the bread is how it will cut up in sandwiches?

A. With as little waste as possible.

Q. And to fit their cutting machines?

A. To fit their cutting machines, and also these are used for the cheaper cut up in sandwiches. That is the 5 cent sandwiches.

159 Q. In other words, the various restaurants which have various kinds of trade and which serve and sell sandwiches of various sizes make special contracts with you as to special sizes for these uses and thence sizes have the weights that you have testified to and that has been the custom of your business for years?

A. Yes.

Q. And is the custom to-day?

A. It is.

Q. Could you satisfy the requirements of your trade if you were to bake those loaves in accordance with this ordinance in the one-pound, 2-pound, 3-pound, 4-pound, 5-pound and 6-pound loaves?

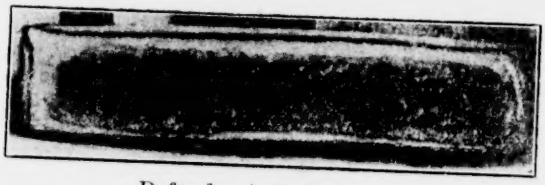
A. I don't think I could.

Q. Why not?

A. The parties want a certain size.
Q. A certain length and a certain height and a certain width?
A. Yes.

Mr. RUBENS: I ask that this loaf of bread which I have offered in evidence, this Special Keystone, be marked as defendant's exhibit.

Said loaf of bread was thereupon received in evidence, marked Defendant's Exhibit CC a photograph of which said loaf is as follows to-wit:



Defendant's Exhibit CC.

160 Mr. RUBENS:

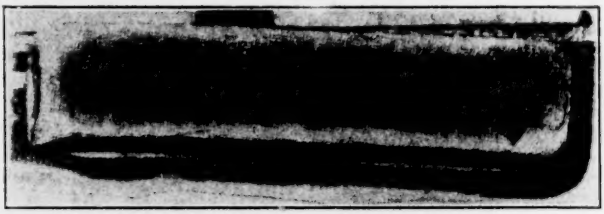
Q. I will show you this loaf of bread, and ask you whether that is a loaf of bread made in your bakery? (indicating).
A. It is.
Q. What is it called?
A. This is called a large French loaf.

Mr. RUBENS: I offer that bread in evidence.

Said loaf of bread was thereupon received in evidence, marked Defendant's Exhibit DD, a photograph of which said loaf is as follows, to-wit:

Defendant's Exhibit DD.

Q. What is that used for, in the restaurant business?
A. In the restaurant, for table use.
Q. For table use?
A. Yes.
Q. What is the weight of that loaf when it comes out of the oven?
A. One pound, six ounces.
Q. Have you got a constand demand, and have you had for years, for French bread weighing a pound, 6 ounces?
A. We have.
Q. Is that a bread that is in demand in trade?
A. It is.



Defendant's Exhibit GG.

Q. Did Mr. King order that particular size?
A. Yes.
Q. Wanted it just that height and that length and that weight?
A. That particular size, two pounds even.
Q. Absolutely to weigh two pounds even?
A. Yes.
Q. How much of that do you sell a day?
A. About 100 loaves.
Q. Only about 100 loaves?
A. Yes.
Q. Is this a loaf of bread that you are making (handing witness loaf of bread)?
A. This is a special size that I have to make for a certain party.
Q. Here in Chicago?
A. Roll, yes.
Q. How much does that weigh?
A. It weighs about 2 ounces and a quarter.

Mr. RUBENS: Not necessary to go into that.

Q. I will ask you as a practical baker whether it is possible to scale off the dough accurately?
A. I am not a practical baker.
Q. You are more of a merchant?
A. I am the financial end of the concern.
Q. The commercial end of it?
A. The commercial end of it.

Mr. RUBENS: Then I won't ask you those questions.

Cross-examination.

By Mr. CASSELS:

Q. How long have you been in the business of making bread by special contract, as you term it, with various customers?
164 A. Ever since we have been in the business, 16 years.
Q. How many other bakers, if you know, in Chicago are engaged in the same kind of trade that you are engaged in?
A. Quite a number.
Q. How many?
A. That is pretty hard to judge. Possibly 6 or 8 in the down town district.

Q. Your business is almost entirely making these loaves on special orders?

A. Yes sir, they are daily orders, standing orders.

Q. And you change the shape and size of your loaf as people want you to change them?

A. From time to time yes.

Q. You say there are 5 or 6 other bakers down town who are engaged in making this special sized bread, almost exclusively, as you are, or only incidentally?

A. No, I think that we are about the only people who make it exclusively for the restaurants.

Q. You are the leading special sized men in Chicago?

A. We are not.

Q. You are the only ones whose business is exclusively among those lines?

A. Exclusively restaurant business.

Q. Where special sizes are necessary?

A. Others make special sizes; not exactly the same sizes as ours.

Q. Their special sizes are different from yours very likely?

A. Very different, yes.

Q. Let us take the Keystone. Indicating Exhibit Y. That is one of the first loaves put up you said that weighed an ounce less than two pounds?

A. Yes.

Q. Do you think it would make a difference to your customer if you were required to make it in two pounds?

A. It would be pretty hard to put it in a pan. The pans are covered.

Q. You could make it a little higher?

A. The pan is made so you could not put any more in that particular pan.

165 Q. You could use another pan?

A. If we have to.

Q. You don't mean to say that the customers who take the Keystone bread demand of you that you shall give them a pound, 15 ounce loaf; they simply specify the size?

A. The size the shape sir.

Q. If a man comes in tomorrow and wants you to make a loaf similar in size and shape to that but to weigh 2 pounds, couldn't you do it for him?

A. I could absolutely, if it was necessary.

Q. You would only have to get a pan that would be the proper size, would you not?

A. Yes.

Q. And you would only put a little more dough in this pan and use this pan?

A. No, the pan covers the loaf.

Q. The pan is not large enough?

Mr. Rubens: No, there is a difference. All this kind of bread is baked in covered pans, while the others are baked in open pans.

Mr. CASSELS: I understand; the Keystone is baked in a covered pan.

A. Yes.

Q. By using a larger pan you could bake a 2-pound loaf of bread without any difficulty. Take the Jumbo bread, indicating Exhibit Z. That weighs 2 pounds 6 ounces, that could be made in a 2-pound loaf, could it not, the same size and shape, and a little shorter?

A. It could so far as that goes, though the restaurant men would lose at least one slice, or possibly two.

Q. You say the reason that they wanted this bread this way was to make as little crust as possible. If you made this weigh 3 pounds instead of 2 pounds and 6 ounces they would have less crust than now?

A. It would be more difficult to bake in a 3 pound loaf
166 than this. A loaf is supposed to bake through. It is liable to be doughy.

Q. If you made that a few inches longer wouldn't it bake through?

A. I would judge about 6 or 7 inches longer to be 3 pounds.

Q. It would not have to be 6 or 7 inches longer, would it; it would only be necessary to have 10 ounces more; that weighs 38 ounces and 10 ounces more would be about a third.

A. Yes.

Q. About a fourth, rather, of the weight?

A. About a fourth.

Q. So if that were 3 or 4 inches longer it would weigh 3 pounds. There would be no difficulty about baking that into a 3-pound loaf?

A. No, there would be no difficulty.

Q. The same is true of the Hotel bread that weighs a pound and 8 ounces. Which is the Hotel bread? Will you point it out?

A. This is it (indicating Exhibit AA).

Q. Is this baked in a closed pan?

A. No sir.

Q. A pan open on top?

A. Yes.

Q. You say there is a demand made for this shape and size?

A. Yes.

Q. As a practical matter the quality of the bread would be just the same as if the loaf were shorter?

A. Yes.

Q. Or if that were longer. And by making it either shorter or longer you could make it weigh either one pound or two pounds?

167 A. Could yes. Make a 2-pound loaf.

Q. With a proper pan you could make a 2-pound loaf of bread just as easily, if a man wanted to use that size?

A. Yes.

Q. When you say on all these special sizes of bread that there is a demand for these special sizes, you don't mean to say that the men come to you and say that they want a bread of special weight?

Mr. RUBENS: That is just exactly what he says he doesn't.

Mr. CASSELS:

Q. Are the dimensions of this bread fixed by the customer or by you?

A. By both; the price also has to be fixed.

Q. The size of each loaf has something to do with the price that you get from this special customer?

A. Yes.

Q. And has nothing to do whatever with the practicability of making it into different weights. If he came in and ordered two pounds instead of three pounds, you could make it just as well?

A. He would not want it.

Q. Suppose he did want it?

A. If he did want it. *Q.* If he did want it I could make it the same as I did the others.

Q. How long have you been making this loaf in this particular size (indicating Exhibit DD)?

A. Since the World's Fair.

Q. Been making it out of the same pans?

A. In the same kind of pans.

Q. How long since you have added a new line of loaves to the general line that you sell?

A. Not very long ago, this was added (indicating Exhibit BB) about two months ago.

—. That is the long Graham loaf, isn't it?

A. Possibly 6 months ago; I would not quite say; I don't quite remember.

Q. What you state as to these special loaves, Keystone, Jumbo and Hotel, would apply to the other loaves, would it not, as to making it larger or smaller?

Mr. RUBENS: We admit that bread can be baked in any size; if a man wants it larger or smaller it can be baked; that is not the point.

168 Mr. CASSELS:

Q. The other men that are engaged in special baking in Chicago have loaves of a different size than yours. That simply means that their customers want either larger or smaller loaves; these are not standard sizes?

A. These are not standard sizes, only with us they are.

Redirect examination.

By Mr. RUBENS:

Q. If a lunch room would have just call enough on an average for sandwiches calling for a loaf like this, is there any reason why they should have a larger loaf and have it manufactured in your bakery and have it stale?

A. Not that I know of.

Q. Isn't it a fact that these lunch counters and eating places order a particular size, according to their experience, with reference to their requirements; isn't that so?

A. Yes.

Q. So as to have as little loss as possible, and utilize as much as possible?
A. That is all.

Recross examination.

By Mr. CASSELS:

Q. This is King-Jumbo (indicating Exhibit GG)?
A. Yes.
Q. In how many different places do you sell this King-Jumbo loaf.
A. Possibly in three places.
Q. Three places?
A. Yes.
Q. How many loaves; I don't care to know the names, but how many loaves do you deliver to each place, without giving the names?
A. They vary somewhat, from 15 to 25 to 30.
Q. You don't deliver them in one loaf lots?
A. No.
Q. You have no reason to believe that these men figure that they are going to use just that number of sandwiches?
A. They do at times. They don't like to cut up a loaf when it is not necessary.
169 Q. When a man says 15 or 20 loaves it is impossible for him to tell?
A. No.
Q. You are not delivering these in one loaf lots?
A. No.

Redirect examination.

By Mr. RUBENS:

Q. The fact is that their experience causes these people to order from you for their own special needs?
A. Yes.
Q. You are a man who makes bread in special sizes, just as the people demand them for the exigencies of their business?
A. Yes.
Q. And these are the sizes (indicating Exhibits Y, Z, AA, BB, CC, DD, EE, FF, GG)?
A. As near as possible; as near as you can tell; as near as we can tell.

JAMES C. GORDON a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RUBENS:

Q. What is your name?
A. James C. Gordon.
Q. Where do you reside?

A. Detroit.
Q. Detroit, Michigan?
A. Yes.
Q. What business are you engaged in?
A. In the bread business.
Q. Manufacturing bread?
A. Yes.
Q. To what extent, as to the daily output of loaf bread on an average?

Mr. CASSELS: If the Court please, I wish a special objection here. This ordinance relates solely to Chicago. Any testimony as to customs or habits of the trade outside of Chicago I should think would be incompetent.

Mr. RUBENS: You don't know what I am going to ask him.

Mr. CASSELS: This is a man from Detroit.

Mr. RUBENS: You don't know what I am going to ask
170 him, at least I don't think you know.

Mr. CASSELS: I think I do.

The COURT: If the witness brings bread here from Detroit to sell

Mr. RUBENS: No. I will tell your Honor what I want to establish by this witness, to be perfectly frank about it and save time; This gentleman here is one of the largest manufacturers of loaf bread in the City of Detroit. In the City of Detroit the same custom with reference to the sale of loaf bread to the consumer prevails and prevails now as prevails in the City of Chicago. This loaf bread is sold to the consumer by the dealer, in loaves costing 5 cents a loaf, or multiples thereof, and I want to show by him that the City of Detroit at one time enacted an ordinance fixing definitely the sizes of the loaves of bread to be sold in the City of Detroit, and I want to show by him that in consequence thereof, because of the fluctuation in the cost of material, it became necessary to increase the price of loaf bread to the consumer, from five cents to six cents, and I want to show the effect upon the business in a city which has the same custom and usage as to the sale of loaf bread as this city, with reference to the loss of their business. That is, that their business fell from 35000 loaves to about 24000 loaves. Am I stating it correctly?

The WITNESS: Yes.

Mr. RUBENS: To 24,000 loaves — day. And I want to follow that up by showing that the city council of the City of Detroit repealed that ordinance and passed an ordinance such as we had under consideration a long time ago, which made it possible for the bakers of Detroit to bake bread in any size, provided they would affix a label, showing the true weight of the bread at a certain time. Now, the reason why I claim this testimony is pertinent is this: That for
years and years and years the trade customs with reference to
171 loaf bread in the City of Chicago has been to sell loaf bread, irrespective of weight, according to the price and to adjust the size of the loaf, that is, 5 cents, 10 cents, 15 cents, 20 cents, etc. to adjust the difference in the cost of the manufacture by increasing or decreasing the size of the loaf, and that an interference with

that trade custom means a tremendous loss in the business: that tends to show that the enforcement of an ordinance like this, it being unnecessarily destructive of the business of the bakers in the City of Chicago operating under similar circumstances, will make such an ordinance unreasonable and oppressive. That is the point. Now, we cannot show what the effect was in Chicago because we never had such an effect here at any time. The question is, and that is the object of all this testimony which is addressed to your Honor, for your Honor's information, on the question of the constitutionality of the ordinance and the reasonableness of the ordinance—what the effect of such an ordinance is and would be upon the trade of the bakers in the City of Chicago, under conditions as they prevail here and which are the same as they did prevail in the City of Detroit.

The COURT: I regard it as very remote, Mr. Rubens.

Mr. RUBENS: So do I.

The COURT: But in order that you have the testimony in I will hear it subject to the objection. I must say that I regard it as too remote to be of any importance here.

Mr. RUBENS: I regard it as remote, your Honor. I regard it myself as remote but as close as anything available. The question is not now remote, but the question is whether it is the best attainable evidence on the question of the reasonableness of this ordinance. That is the question. That is the test.

172 The COURT: I think you will save time to take the evidence. I must say that as at present advised I shall not consider it.

Mr. RUBENS:

Q. What is the name of your firm?

A. Gordon & Pagel Bread Company.

Q. How many loaves of bread on an average does your bakery sell in the City of Detroit?

A. About 30,000.

Mr. RUBENS: I introduce in evidence an ordinance of the City of Detroit, which is found in a Revision of the ordinances of the city of Detroit, of the year 1884, at page 165.

Mr. CASSELS: Is that a true copy? I won't object to it on that ground. I object to it on general grounds.

Said ordinance so introduced in evidence is in words and figures as follows to-wit:

Detroit Bread Ordinance.

Revised Ordinances of Detroit of 1895, Chapter CIII, Page 282.

Manufacturing of Bread.

Approved April 21, 1870.

SECTION 1. It shall not be lawful for any person to use or carry on the grade or business of a baker, either in person or by employing

any other person to use or carry on the said trade or business, under his or her direction, or for his or her profit or benefit, within said city, without having obtained from the Common Council a permit for that purpose.

SECTION 2. Every person desirous to use or carry on said trade or business, shall make application in writing to the Common Council, setting forth the street and the number of the place of business in which he or she intends to carry on such trade or business; and if the Common Council, shall grant such application, the City Clerk shall deliver such person a permit for the purpose aforesaid, for which he shall be entitled to receive from such person the sum of
173 twenty-five cents; and the said permit shall be in force till the second Tuesday in March then next ensuing.

SECTION 3. The said Clerk shall record in a book, to be kept in his office for public inspection, the name, street and number of place of business, of each person to whom he shall issue a permit, as provided in section two of this ordinance.

SECTION 4. All bread of every description, manufactured by the bakers of this city for sale, shall be made of good and wholesome flour or meal, into loaves of one pound, two pounds, and four pounds, and no other, avoirdupois weight; and no baker shall make for sale, or shall sell or expose for sale any bread that shall be deficient in weight, according to the requisitions prescribed in the preceding section of this chapter; Provided, always, that such deficiency in the weight of such bread shall be ascertained by the sealer of weights and measures, by weighing, or causing to be weighed in his presence, within eight hours after the same shall have been baked, sold or exposed for sale; and provided, further, that whenever any allowance in the weight shall be claimed on account of any bread having been baked, sold, or exposed for sale more than eight hours, as aforesaid, the burden of proof in respect to the time when the same shall have been baked, sold, or exposed for sale shall devolve upon the defendant or baker of such bread.

SECTION 5. The sealer of weights and measures, under the direction of the chief of police, shall be inspector of bread and it shall be his duty, and he is hereby authorized and required, from time to time, and not less than once in each month, at all seasonable hours, to enter into and inspect and examine every baker's shop, storehouse, or other building where any bread is or shall be baked,
174 stored, or deposited or offered for sale, and to inspect and examine all bread found therein, and also to stop, detain and examine, in any part of said city, any person or persons, wagons or other carriages, carrying any loaf of bread for the purpose of sale, and weigh the same, and determine whether the same are in violation of the true intent and meaning of this chapter; and if the said inspector shall find any bread not conformable to the directions herein contained or any part of them, he shall make complaint thereof for the purpose of having such person prosecuted according to law.

SECTION 6. No person or persons shall obstruct or in any manner impede or willfully delay, the said sealer of weights and measures in the execution of his duties under this ordinance, either by refusing

him or delaying his entrance or admission into any of the places above mentioned, or refuse or omit to stop their wagon or carriage as aforesaid, whereby the due execution of this ordinance, or any part of it shall be impeded or obstructed.

SECTION 7. Any violation of any of the provisions of this ordinance shall be punished by a fine not to exceed $50 and the costs of prosecution, and the offender may be imprisoned in the Detroit House of Correction until the payment thereof; Provided, always, that the term of such imprisonment shall not exceed the period of six months.

Mr. RUBENS: This old ordinance which I have here in my hand now fixed the sizes of the loaves of bread, didn't it?

A. Yes.

Q. Before that ordinance was in force, how many loaves of bread did your concern sell a day in the City of Detroit, on an average?

A. Under the old ordinance?

A. Yes, this old ordinance.

A. We ran before, that is, up to the time we changed the price, about 35,000 a night.

175 Q. When the ordinance was in force what did you do in order not to sell at a loss?

A. Raised the price of bread.

Q. From how much to how much?

A. A cent a loaf.

Q. Of a one pound loaf from 5 cents to six cents?

A. Yes sir.

Q. Why did you raise it a full cent?

A. Because the ordinance compelled us to sell at 16 ounce loaf of bread.

Q. There are no fractions of a cent?

A. No.

Q. And consequently to raise the price you have got to go up a full cent or down a full cent?

A. Yes.

Q. When you did increase the price, what effect did it have on your business, your city business?

A. It demoralized our business.

Q. To what extent?

A. It knocked our output down about 7,000 a night.

Q. 7,000 loaves of bread a night?

A. Yes.

Mr. RUBENS: The ordinance has been amended now to the effect that bread may be sold in any sized loaf, provided it bears a label showing the true weight.

The COURT: Showing the true weight.

Mr. RUBENS: The old ordinance will appear more fully in a case reported in the Michigan reports, which counsel will cite and which I will cite.

Cross-examination.

By Mr. CASSELS:

Q. You were in the bread business at the time of the first ordinance that Mr. Rubens has spoken about?

A. No.

Q. You were not — business at that time?

A. That ordinance I believe was something like 35 or 36 years ago.

Q. 35 or 36 years ago when it was in force?

A. Yes, I was in business when it was in force.

Q. I want to ask you if it was enforced in the city of Detroit?

A. Yes, it was enforced.

176 Q. Did the bakers all make their bread of the sizes prescribed in that ordinance?

A. Yes.

Q. And sold it.

A. Yes.

Q. In other words, they were able to obey the ordinance?

A. Yes.

Q. The only trouble you found was that it was at a loss?

A. Our trouble came after the price was put up above a certain point.

Q. When first was the price raised from 5 cents to six cents for a pound loaf?

A. The flour controlled the price of the bread.

Q. No, but when; about what time, if you remember?

A. I can't remember just the exact date, but under the advance of last year's flour there, it was somewhere the fore part of last summer.

Q. You raised the price to six cents?

A. Yes.

Q. Before that you had been selling at 5 cents?

A. Our price was up a year and a half previous, or two years previous, when we had a higher advance on flour.

Q. You raised the price when the advance was made on flour?

A. Yes.

Q. And when flour was down you let the price of bread come down?

A. Yes.

Q. At the same time you were delivering to the public a pound loaf of bread?

A. Yes.

Q. What other weight loaves did you sell at the same time?

A. We had a one pound, two pound ordinance, either one pound, 2 pound, 4 pound.

Q. And you made a number of these different weights?

A. Yes.

Q. How many years was this ordinance in force?

A. It was in force; I can't give you the number of years, different years.

Q. Different years?

A. Yes.

Q. When was it changed?
A. I can't remember.
177 Q. How long ago, considerably less than a year ago?
A. Yes.
Q. You know it was considerably less than a year ago?
A. Yes.
Q. In Detroit you must have found no difficulty in scaling your bread so that you are sure to make it weigh a pound.
A. We had to allow for that; we had our shrinkages just the same as they have here.

Redirect examination.

By Mr. RUBENS:

Q. Isn't it a fact that in order to adjust the cost of the raw material to the price of the goods which you sold that a great many of the bakers had to use an inferior flour?
A. Yes, that was the great difficulty in Detroit.
Q. It was this choise of either advancing the price of the loaf to the consumer to six cents or to go to work and take such inferior material that you and the others could afford to make a profit?
A. That is what we did.
Q. That led finally to the city council of Detroit changing the ordinance?
A. Yes.

PAUL SCHULZE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. RUBENS:

Q. What is your full name?
A. Paul Schulze.
Q. Are you a member of the Schulze Bakery Company?
A. Yes.
Q. Its president?
A. Yes.
Q. How long have you been in the bakery business in Chicago?
A. Since 1893.
Q. From your experience, what percentage of the loaf bread
178 that is sold in the City of Chicago is sold in 5-cent loaves and 10-cent loaves and 15-cent loaves?
A. I should judge about 95 per cent.
Q. 95 per cent. What, in your judgment as an experienced baker is the proportion of the loaf bread that is made by restaurants and housewives in Chicago, as against the loaf bread which is made by bakers?
A. I should judge about 50 per cent.
Q. One half of the bread is made by the bakers and the other half of the bread is made by the restaurants, hotels and housewives
A. Yes sir.

Mr. RUBENS: That is all. Take the witness.

Cross-examination.

By Mr. CASSELS:

Q. You say that 95 per cent of the loaf bread in Chicago is made in loaves which sell for five, ten and 15 cents?

A. Yes, that is outside of the restaurant business.

Q. Taking only these loaves that are sold for five, ten, or 15 cents, what proportion are sold at five cents, about what proportion?

A. Oh, I should think about 85 per cent.

Q. About 85 per cent. That is, 85 per cent of all the loaf bread that is sold for these different prices is sold for 5 cents a loaf?

A. Yes sir.

Q. How many different kinds of bread now are you selling for 5 cents a loaf?

A. About 15.

And thereupon the defendant rested his case.

The foregoing was all the testimony introduced or offered in evidence on the trial of the above entitled cause.

179 And thereupon the defendant submitted to the court the following propositions of law, each of which propositions of law the court marked "refused," which said propositions of law were as follows:

And now comes the said defendant, by Rubens, Fischer, Mosser & Rigby, his attorneys, and submits the following propositions of law and asks that the same may be held as law in the decision of the above entitled cause:

First. That sections 2, 3, and 4 (except the provisions of Section 4 relating to the violations of section 1) and each of them, of the ordinance of the city of Chicago in the declaration in this case and in each count thereof set forth are illegal and void because said Sections 2 and 3 and said portions of said section 4 of said ordinance, and each of them, are in violation of and contrary to sections 1 and 2 of Article 11 of the Constitution of the State of Illinois. (Refused.)

Second. That sections 2, 3 and 4 (except the provisions of section 4 relating to violations of section 1) and each of them of the ordinance of the City of Chicago in the declaration in this cause and each count thereof set forth are illegal and void because said sections 2 and 3 and said portions of said section 4 of said ordinance are in violation of and contrary to section 1 of the 14th Amendment to the Constitution of the United States, which said section 1 is as follows to-wit:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

180 citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (Refused.)

To which said action of the Court in so marking and refusing said

propositions of law, and each of them, the defendant then and there by its attorney duly excepted.

Thereupon the Court found the issues of the case for the plaintiff, to which said finding of the court the defendant then and there by his attorney duly excepted.

Whereupon the defendant then and there moved the court to set aside the finding so rendered and to grant a new trial of this cause, and filed the following reasons in writing for his motion, to-wit:

And now comes the said defendant, Mathias Schmidinger, and moves for a new trial, in the above entitled cause, and as grounds therefor states:

First. The finding and judgment of the court are contrary to law;

Second. The finding and judgment of the court are contrary to the evidence.

Third. The Court erred in refusing to hold the propositions of law, and each of them, submitted by the defendant.

But the court denied the motion and gave judgment on the finding in favor of the plaintiff and against the defendant, to which decision of the court in denying such motion and in entering such judgment, the defendant by his counsel then and there duly excepted.

And forasmuch as the matters above set forth do not fully
181 appear of record, the defendant tenders this, his bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made, which is done accordingly this 3rd day of June, A. D. 1910.

THOMAS G. WINDES,
Judge of the Circuit Court of Cook County.

And thereupon on the same day to wit, on the 3rd day of June, A. D. 1910, a certain appeal bond was filed in the office of the Clerk of said Court in words and figures following to-wit:

Appeal Bond—Supreme Court.

Know all men by these presents: That we Mathias Schmidinger and Paul Schulze both of the City of Chicago of the County of Cook and State of Illinois are held and firmly bound unto The City of Chicago, a municipal corporation also of the same County and State, in the penal sum of Two Hundred and fifty ($250.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly severally and firmly by these presents.

Witness our hands and seals this third day of June, A. D. 1910.

The Condition of the above obligation is such that whereas, the said City of Chicago, a municipal corporation did on the third day of June, A. D. 1910, in the Circuit Court of Cook County, in the State aforesaid, and of the May term thereof, A. D. 1910, recover a judgment against the above bounden Mathias Schmidinger for the sum of one hundred ($100.00) Dollars, besides costs of suit, from

which said judgment of the said Circuit Court of Cook County, the said Mathias Schmidinger has prayed for and obtained an
182 appeal to the Supreme Court of said State.

Now, therefore, if the said Mathias Schmidinger shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs interests and damages rendered, and to be rendered, against him in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virture.

MATHIAS SCHMIDINGER. [SEAL.]
PAUL SCHULZE. [SEAL.]

Approved:

JOSEPH E. BIDWILL, JR., *Clerk.*

O. K.
EDWARD J. BRUNDAGE,
Corporation Counsel.

EDWIN H. CASSELLS,
Attorneys for Plaintiff, City of Chicago.

STATE OF ILLINOIS,
Cook County:

I, Paul Schulze, do solemnly swear that I am worth over and above all my just liabilities the sum of ten thousand (10000.00) dollars, and that I am the owner of record in fee simple of the following described real estate located in Cook County, Illinois; Lot eleven (11) and the southwesterly half of lot thirteen (13) in Block ten (10) in Kenilworth, being a subdivision of parts of fractional sections twenty two (22) and twenty seven (27) and part of section 28 all in township 42 N. R. 13 east of 3rd P. M.

PAUL SCHULZE.

Subscribed and sworn to before me this third day of June, A. D. 1910

[SEAL.]

IRVING E. READ,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

I, Joseph E. Bidwill, Jr., Clerk of the Circuit Court of Cook County and the keeper of the records and files thereof in
183 the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the record except the Bill of Exceptions the original of which is incorporated herein by stipulation in a certain cause lately pending in said Court on the Law side thereof, between City of Chicago plaintiff and Mathias Schmidinger, defendant.

In Witness whereof, I have hereunto set my hand and affixed the

seal of said Court, at Chicago in said County this 3rd day of June 1910.

[SEAL.] JOSEPH E. BIDWILL, JR., *Clerk.*

Assignment of Errors.

Now comes the defendant and appellant, Mathias Schmidinger by Rubens, Fischer & Mossier & Rigby, his attorneys and shows to the court that there is manifest error in the proceedings and the judgment of the Circuit Court of Cook County herein in this to-wit:

First. The finding and judgment of the court are contrary to law.

Second. The finding and judgment of the court are contrary to the evidence.

Third. The court erred in marking as "refused" and refusing to hold the propositions of law and each of them submitted by the defendant.

Wherefore, appellant prays that for said errors and each of them and other manifest error appearing in the record said judgment be reversed and said cause be remanded to the Circuit Court of Cook county with directions to enter judgment in favor of the defendant and against the plaintiff.

RUBENS, FISHER, MOSSER & RIGBY,
Attorneys for Appellant, Mathias Schmidinger.

184 At a Supreme Court, Begun and held at Springfield on Tuesday, the First day of December in the year of our Lord One Thousand Nine Hundred and eight within and for the State of Illinois.

Present: James H. Cartwright, Chief Justice; John P. Hand, Justice; Guy C. Scott, Justice; William M. Farmer, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit, on the Twelfth day of December, A. D. 1908, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court had and entered of record to-wit:

No. 6410.

CITY OF CHICAGO, Appellant,
vs.
MATHIAS SCHMIDINGER, Appellee.

Appeal Circuit Court Cook.

Now on this day comes appellant by counsel and moves the Court to consolidate this cause with case 6411 City of Chicago vs. Mathias

Schmidinger, which motion is allowed and this cause is ordered consolidated with 6411.

185 Be It Remembered, to-wit, on the twelfth day of December, A. D. 1908, the same being one of the days of the term of Court aforesaid the following proceedings were by said Court had and entered of record to-wit;

6410.

CITY OF CHICAGO, Appellant,
vs.
MATHIAS SCHMIDINGER, Appellee.

Appeal Circuit Court Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that —— ——, appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee —— —— having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Edwin H. Cassels for appellant and Harry Rubens for appellee and consolidated with case 6411 is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

186 Be it remembered, to-wit, on the 12th day of December, A. D. 1908, the same being one of the days of the term of Court aforesaid the following proceedings were by said Court had and entered of record to-wit:

6411.

CITY OF CHICAGO, Appellant,
vs.
MATHIAS SCHMIDINGER, Appellee.

Appeal Circuit Court Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that —— ——, appellant, hath filed herein a duly certified transcript of the record and proceedings

of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee —— —— having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Edwin H. Cassels for appellant and Harry Rubens for appellee is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

187 At a Supreme Court, Begun and held at Springfield on Tuesday, the Seventh day of December in the year of our Lord one Thousand Nine hundred and nine, within and for the State of Illinois.

Present: William M. Farmer, Chief Justice; James H. Cartwright, Justice; John P. Hand, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; George A. Cooke, Justice; William H. Stead, Attorney General; Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that afterwards, to-wit, on the 22nd day of December, 1909, the opinion of the Court was filed in the words and figures following to-wit:

No. 6410.

CITY OF CHICAGO, Appellant,
v.
MATHIAS SCHMIDINGER, Appellee.

Error to ——.

Appeal from Circuit Court Cook Co.

188 THE CITY OF CHICAGO, Appellant,
vs.
MATHIAS SCHMIDINGER, Appellee.

Opinion Filed December 22, 1909.

Appeal from the Circuit Court of Cook County; the Hon. Thomas G. Windes, Judge presiding.

Edward J. Brundage, Corporation Counsel; Edwin H. Cassels, Emil C. Wetten, and Clarence N. Boord, for appellant.

Rubens, Fischer & Mosser, for appellee.

Per Curiam: The principles involved in this case are the same as those in the case of City of Chicago v. Schmidinger, (ante, p. 167,) and in accordance with the views expressed in that opinion the judgment must be reversed in this case.

The judgment of the circuit court will be reversed and the cause remanded for a new trial.

Reversed and remanded.

189 At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of December, in the year of Our Lord One Thousand Nine Hundred and Nine, within and for the State of Illinois.

Present: William M. Farmer, Chief Justice; James H. Cartwright, Justice; John P. Hand, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; George A. Cooke, Justice; William H. Stead, Attorney-General; Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, that afterwards, to-wit, on the 22nd day of December, 1909, the opinion of the Court was filed in the words and figures following to-wit:

No. 6411.

CITY OF CHICAGO, Appellant,
v.
MATHIAS SCHMIDINGER, Appellee.

Error to —.

Appeal from Circuit Court Cook Co.

190 THE CITY OF CHICAGO, Appellant,
vs.
MATHIAS SCHMIDINGER, Appellee.

Opinion Filed December 22, 1909.

Appeal from the Circuit Court of Cook County; the Hon. Thomas G. Windes, Judge, Presiding.

Edward J. Brundage, Corporation Counsel, Edwin H. Cassels, Emil C. Wetten, and Clarence N. Boord, for appellant.

Rubens, Fischer & Mosser, for appellee.

Mr. Justice HAND delivered the opinion of the court.

This was an action in debt commenced by the city of Chicago against Mathias Schmidinger in the circuit court of Cook county

to recover certain penalties alleged to have accrued to the city in consequence of the violation by the defendant of an ordinance of the city regulating the sale and prescribing the weight and quality of bread in the loaf, made and sold or offered for sale within the city. The declaration contained ten counts and a plea of nil debet was filed. A jury was waived and a trial was had before the court, and a judgment was entered in favor of the defendant. The city has prosecuted an appeal direct to this court on the ground that the constitutionality of said ordinance is involved.

The ordinance, in part, is as follows:

"SEC. 2. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the city of Chicago
191 shall weigh a pound avoirdupois, (except as hereinafter provided,) and such loaf shall be considered to be the standard loaf in the city of Chicago. Bread may also be made or procured for the purpose of sale, sold, offered or exposed for sale, in half, three-quarter, double, triple, quadruple, quintuple, or sextuple loaves, and in no other way. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the city shall have affixed thereon, in a conspicuous place, a label at least one inch square, or if round, at least one inch in diameter, upon which label there shall be printed in plain type * * * the weight of the loaf in pound, pounds or fraction of a pound avoirdupois, whether the loaf be a standard loaf or not. The business name and address of the maker, baker or manufacurer of the loaf shall also be printed plainly on each label.

"SEC. 3. Every maker, baker or manufacturer of bread, every proprietor of a bakery or bakeshop, and every seller of bread in the city of Chicago, shall keep scales and weights suitable for the weighing of bread in a conspicuous place in his bakery, bakeshop or store, and shall, whenever requested by the buyer, and in the buyer's presence, weigh the loaf or loaves of bread sold or offered for sale.

"SEC. 4. If any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale within the city of Chicago * * * any bread the loaf or loaves of which are not standard half, three-quarter, double, triple, quadruple, quintuple or sextuple loaves, as defined in section 2 of this
192 ordinance, * * * or shall make or procure for the purpose of sale, sell, offer or expose for sale within the city of Chicago any standard loaf or loaves of bread which do not weigh one pound each, or any bread the loaf or loaves of which do not weigh as much as the weight marked thereon, or any bread the loaf or loaves of which do not have affixed thereon the label marked as hereinbefore provided, contrary to the provisions of this ordinance, such person, firm or corporation shall be fined not less than $10 nor more than $100 for each offense.

"SEC. 5. The provisions of this ordinance * * * shall not apply to * * * what is commonly known as 'stale bread', sold

as such, provided the seller shall at the time of sale expressly state to the buyer that the bread so sold is stale bread."

At the close of the evidence the defendant submitted to the court, in writing, the following propositions of law, which were held by the court to be the law of the case:

1. "That sections 2, 3 and 4, (except the provision of section 4 relating to violations of section 1,) and each of them, of the ordinance of the city of Chicago in the declaration in this case, and each count thereof, set forth, are illegal and void, because said sections 2 and 3 and said portions of said section 4 of said ordinance, and each of them, are in violation of and contrary to sections 1 and 2 of article 2 of the constitution of the State of Illinois and of the fourteenth amendment of the constitution of the United States.

2. "That sections 2 and 4, (except the provision of section 4 relating to violations of section 1,) and each of them, of the
193 ordinance of the city of Chicago in the declaration in this case, and each count thereof, set forth, are illegal and void, because the provisions of said sections are unreasonable and in restraint of trade."

The questions, therefore, for determination in this case are, first, is said ordinance unconstitutional; and secondly, if said ordinance is not constitutional, is there such an unreasonable regulation of the business of the defendant, who is a baker, attempted thereby, as to render the ordinance void.

It is first contended that said ordinance is unconstitutional in this: that it deprives the defendant of his property without due process of law, by violating his right to freely contract for the disposition and sale of his property. This court has held that the disposition of property may be limited or regulated, where the public interest requires that its disposition should be limited or regulated. (City of Chicago v. Openheim, 229 Ill. 313,) and the legislature, in the City and Village act, art. 5, sec. 1, clause 52,) provided, in enumerating the powers of the cities and villages of this State, that they shall by ordinance have the right to regulate the sale of bread and to prescribe the weight and quality of bread in the loaf *loaf*. We are therefore of the opinion that the ordinance in question cannot be said to be unconstitutional on the ground that the legislature is powerless to authorize the cities and villages of this State to legislate upon the subject of the sale of bread, or to determine by ordinance the weight and quality of bread in the loaf offered for sale or sold in such municipalities. The power to regulate the sale
194 and determine the weight of bread in the loaf when offered for sale, as a legitimate exercise of the police power by such municipalities as the plaintiff, has uniformly been recognized by the courts, and the exercise of such power is now too firmly established to be challenged. Munn v. People, 69 Ill. 80; People v. Wagner, 86 Mich. 594; Guillotte v. City of New Orleans, 12 La. Ann. 432; Mayor v. Yuille, 3 Ala. 137; Paige v. Fazackerly, 36 Barb. 392; Commonwealth v. McArthur, 152 Mass. 522; In re Nasmith, 2 Ont. 192.

It is next contended that the ordinance is unconstitutional in this:

that it singles out the business of defendant as a baker and places upon the product manufactured and sold by him a burden, under the guise of regulating his business, which is not required to be borne by other persons who are engaged in manufacturing or selling other food products,—i. e., that the ordinance is unconstitutional, as amounting to special legislation, within the constitutional inhibition. The ordinance is general in its terms and applies to all persons in the city of Chicago engaged in the making and sale of bread by the loaf, and is therefore, in a constitutional sense, not special legislation. (Hawthorn v. People, 109 Ill. 302; Gundling v. City of Chicago, 176 id. 340; City of Chicago v. Bowmann Dairy Co. 234 id. 294.) We are of the opinion that said ordinance cannot be successfully assailed on the ground it is unconstitutional.

The question then arises, is the ordinance such an unreasonable regulation of the business of the defendant as a baker as to render it void? The ordinance establishes a loaf of one pound as
195 the standard loaf, and provides that bread may be made and sold in loaves containing one-half pound, three-quarters of a pound, one pound, two pounds, three pounds, four pounds, five pounds and six pounds, and in no other way, and the contention is made that the limiting of loaves to these weights is such an unreasonable limitation as to render the ordinance void. In the Wagner case, supra, the manufacture and sale of loaves of bread by the ordinance, there under consideration was limited to three sizes, namely, one pound, two pounds and four pounds, and the ordinance was sustained. The ordinance here in question authorizes the manufacture of eight loaves, varying in size from a half-pound to six pounds in weight. We do not think the ordinance void for the reason suggested.

It is also urged that the ordinance is void for unreasonableness in this: that it does not permit loaves of bread to be manufactured, to be sold by special contract, other than those of the weights fixed by the ordinance, although the evidence shows that there is a demand in the city of Chicago for loaves of a weight differing from the weights fixed by the ordinance. It might be urged, on the same ground, that a statute establishing the rate at which money might be loaned was void because it did not permit parties to contract for a higher rate of interest than that fixed by the statute. Upon reflection it will appear, we think, that an ordinance permitting the size of a loaf to be controlled by private contract would in most if not all cases entirely abrogate the ordinance. We think the fact that the ordinance fixes the size of the loaves which may be sold and prohibits the sale of bread in loaves of other sizes
196 does not render the ordinance void for unreasonableness.

The ordinance is a police regulation, and the regulation of the size of the loaf or loaves which it provides may be manufactured and sold is a legitimate exercise of the police power and within the discretion of the legislative body of the cities and villages of this State, which discretion will only be reviewed by the courts when such discretion has clearly been abused, which does not appear here

to be the case, and the fact that a compliance with the terms of the ordinance is inconvenient will not render the same void.

It is said the ordinance cannot be complied with without great loss to the defendant, as by evaporation the weight of a loaf of bread constantly changes after leaving the oven, and that to comply with the ordinance the loaf must weigh more than a pound, or a fractional pound, or a multiple of a pound when it leaves the oven that it may not be short weight when sold. There is nothing in the ordinance which limits the weight of a loaf to a pound or the fractional part of a pound or the multiple of a pound. The ordinance was passed with a view only to prevent the sale of loaves of bread which were short in weight, and the fact that the ordinance does not cover the sale of stale bread does not render it unreasonable, as it only exempts bread which is sold as stale bread, the determination of the fact whether the bread sold is stale bread being left entirely to the person making the sale. Neither does the ordinance attempt to regulate the price of bread, and the fact that the elements which enter into the composition of bread may fluctuate in value and thereby necessitate a change in the price of
197 the loaf sold does not make the ordinance unreasonable and void.

Many objections not herein specifically mentioned are urged against the ordinance which it is claimed show it to be unreasonable, but when considered and reduced to a final analysis they lead back, in each instance, to the proposition that no valid ordinance can be passed regulating the sale of bread by the loaf or prescribing the weight or weights of loaves of bread manufactured and offered for sale and sold. The argument in each instance goes too far, for, as we have said, ordinances of this class have been passed and enforced and frequently sustained by the courts.

It is also urged that the provisions of section 2 of the ordinance, in so far as it provides that labels shall be placed upon each loaf of bread manufactured and offered for sale or sold, stating the size of the loaf and the name of the manufacturer thereof, is unreasonable and renders that section of the ordinance void. We cannot give our assent to this contention. The same contention was made in the Bowman Dairy Co. case, supra, in regard to placing labels upon bottles or jars containing milk offered for sale, and the contention was overruled. That case is conclusive upon this point in the case at bar. The courts have nothing to do with the wisdom of this ordinance. That question rested entirely with the city council of the city of Chicago. While its provisions may be drastic we do not think the ordinance is unconstitutional or that it is unreasonable and therefore void.

The judgment of the circuit court will be reversed and the cause remanded for a new trial.

Reversed and remanded.

198 At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh day of December, in the Year of Our Lord One Thousand Nine hundred and Nine, within and for the State of Illinois.

Present: William M. Farmer, Chief Justice; James H. Cartwright, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin N. Carter, Justice; George A. Cooke, Justice; William H. Stead, Attorney General; Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit, on the Twenty Second day of December A. D. 1909, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of Record, to-wit:

No. 6410.

CITY OF CHICAGO, Appellant,
v.
MATHIAS SCHMIDINGER, Appellee.

Appeal Circuit Court Cook.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises are of opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid, there is Manifest Error:

Therefore, it is considered by this Court that for that Error, and also in the record and proceedings aforesaid, the judgment of the Circuit Court in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Cook County for a new trial.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee costs by it in this behalf expended, and that it have execution therefor.

199 At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of December, in the Year of Our Lord one Thousand Nine Hundred and Nine, within and for the State of Illinois.

Present: William M. Farmer, Chief Justice; James H. Cartwright, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin N. Carter, Justice; George A. Cooke,

Justice; William H. Stead, Attorney General; Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit, on the Twenty Second day of December A. D. 1909, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of Record, to-wit:

No. 6411.

CITY OF CHICAGO, Appellant,
v.
MATHIAS SCHMIDINGER, Appellee.

Appeal Circuit Court Cook.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises are of opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid, there is Manifest Error:

Therefore, it is considered by this Court that for that Error, and also in the record and proceedings aforesaid, the judgment of the Circuit Court in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Cook County for a new trial.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee costs by it in this behalf expended, and that it have execution therefor.

200 At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of June, in the Year of Our Lord One Thousand Nine Hundred and Ten, within and for the State of Illinois.

Present: William M. Farmer, Chief Justice; James H. Cartwright, Justice; John P. Hand, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; George A. Cooke, Justice.

William H. Stead, Attorney General.

Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit, on the 14th day of June, A. D. 1910, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court had and entered of record, to-wit:

No. 7245.

CITY OF CHICAGO, a Municipal Corporation, Appellee,
vs.
MATHIAS SCHMIDINGER, Appellant.

Appeal Circuit Court Cook.

Now on this day come both parties hereto and move the Court that abstracts and briefs in 6410 City of Chicago vs. Schmidinger be allowed to stand as abstracts and briefs in this cause and that the case be determined at this term, and the Court not being advised in the premises doth take the motion under advisement.

And afterwards to-wit on the 15th day of June, A. D. 1910, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court had and entered of record to-wit:

No. 7245.

CITY OF CHICAGO, a Municipal Corp., Appellee,
vs.
MATHIAS SCHMIDINGER, Appellant.

Appeal Circuit Court Cook.

And now on this day the Court having duly considered the motion of both parties hereto to consider this cause on abstracts and briefs filed in case 6410 and to determine the cause at this term of Court and being now fully advised in the premises grants the motion.

201 Be it remembered, to-wit, on the 28th day of June, A. D. 1910, the same being one of the days of the term of Court aforesaid the following proceedings were by said Court had and entered of record, to-wit:

7245.

CITY OF CHICAGO, a Municipal Corporation, Appellee,
vs.
MATHIAS SCHMIDINGER, Appellant.

Appeal Circuit Court Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that —— ——, appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof,

and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee —— —— having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is hereby submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

202 At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of June, in the Year of Our Lord One Thousand Nine Hundred and Ten, within and for the State of Illinois.

Present: Alonzo K. Vickers, Chief Justice; James H. Cartwright, Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; George A. Cooke, Justice.

William H. Stead, Attorney General.

Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it Remembered, that afterwards, to-wit on the 29th day of June, 1910, the opinion of the Court was filed in the words and figures following to-wit:

No. 7245.

CITY OF CHICAGO, Appellee,
v.
MATHIAS SCHMIDINGER, Appellant.

Appeal from Circuit Court Cook.

203 Docket No. 7245—Agenda 81—June, 1910.

CITY OF CHICAGO, Appellee,
v.
MATHIAS SCHMIDINGER, Appellant.

Per CURIAM: This was an action of debt commenced by the city of Chicago against Mathias Schmidinger, in the circuit court of Cook county, to recover certain penalties alleged to have accrued to the city in consequence of the violation by the defendant of an ordinance of the city regulating the sale and prescribing the weight and quality of bread in the loaf, made and sold and offered for sale within the city. The declaration contained ten counts and a plea of *nil debet* was filed. A jury was waived and a trial was had before the court,

and a judgment was rendered in favor of the defendant. The city prosecuted an appeal to this court direct, on the ground that the constitutionality of an ordinance was involved, and the judgment of the circuit court was reversed, (City of Chicago v. Schmidinger, 243 Ill. 167,) and the case was remanded for a new trial. The case was re-instated in the trial court, where it was again tried before the court without a jury. The same evidence was offered on the second trial that was heard on the first trial, and the trial court held the ordinance relied upon by the city was not in conflict with the constitution of this State or the constitution of the United States but was a valid ordinance, and rendered judgment in favor of the city and against the defendant for $100 and costs of suit, and the defendant has prosecuted an appeal to this court, and has assigned as error that the ordinance relied upon by this court, is in conflict with sections 1 and 2 of article 2 of the constitution of this State and in conflict with section 1 of the fourteenth amendment to the constitution of the United States.

For the reasons stated in City of Chicago v. Schmidinger, supra, we are of the opinion the ordinance of the city of Chicago regulating the sale and prescribing the weight and quality of bread in the loaf, made and sold and offered for sale within the city of Chicago, is a valid ordinance and not in conflict with the constitution of this State or the constitution of the United States.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

204 At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of June, in the Year of Our Lord One Thousand Nine Hundred and Ten, within and for the State of Illinois.

Present: Alonzo K. Vickers, Chief Justice; James H. Cartwright, Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; George A. Cooke, Justice.

William H. Stead, Attorney General.

Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS *Clerk.*

Be it remembered, to-wit, on the Twenty-ninth day of June A. D. 1910, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of Record, To-wit:

No. 7245.

CITY OF CHICAGO, Appellee,
v.
MATHIAS SCHMIDINGER, Appellant.

Appeal Circuit Court Cook.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore, it is considered by this Court that the Judgment aforesaid be Affirmed in all things, and stand in full Force and Effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by it in this behalf expended, and that it have execution therefor.

205 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, Do Hereby Certify that the foregoing pages numbered from 1 to 204 inclusive are a true, full and complete transcript of the record and proceedings in the case of Mathias Schmidinger, appellant vs. City of Chicago, a municipal corporation, appellee and also of the opinion of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 29th day of July A. D. 1910.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

206 *Assignment of Errors and Prayer for Reversal.*

Filed Jul- 26, 1910. J. McCan Davis, Clerk of Supreme Court.

Supreme Court of Illinois.

CITY OF CHICAGO, a Municipal Corporation, Plaintiff and Appellee,
vs.
MATHIAS SCHMIDINGER, Defendant and Appellant.

Now comes the above defendant and appellant, Mathias Schmidinger, and files herewith his petition for a writ of error to the Su-

preme Court of the United States, and says that there are errors in the records and proceedings of the above entitled cause, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

The Supreme Court of Illinois erred in holding and deciding that Sections 2, 3, and 4 (except the provisions of Section 4 relating to violations of Section 1), and each of them, of the ordinance of the City of Chicago set forth in the declaration in this cause, and each count thereof, were valid. The validity of said sections, and each of them, was denied and drawn in question by the defendant, on the ground of their being repugnant to the Constitution of the United States and in contravention thereof.

207 The said errors are more particularly set forth as follows:

The Supreme Court of Illinois erred in holding and deciding:

First. That said Sections 2, 3 and 4 (except the provisions of Section 4 relating to violations of Section 1), and each of them, of said ordinance of the said City of Chicago, did not abridge the privileges and immunities of citizens or of this defendant, as guaranteed by the Fourteenth amendment of the Federal Constitution. As to each of said Sections 2, 3 and 4 of said ordinance severally the plaintiff in error says that the Supreme Court of Illinois erred in not holding and ruling that the same was and is a law which abridges the privileges or immunities of the plaintiff in error and other citizens of the United States, and for that reason infringes said Fourteenth amendment and is invalid, and in not reversing the said judgment of the Circuit Court of Cook County on that ground.

Second. That said Sections 2, 3 and 4 (except the provisions of Section 4 relating to violations of Section 1), and each of them, of said ordinance of the said City of Chicago, did not deprive any person or this defendant of life, liberty or property without due process of law, as guaranteed by the Fourteenth amendment of the Federal Constitution. As to each of said Sections 2, 3 and 4 of said ordinance severally plaintiff in error says that the Supreme

208 Court of Illinois erred in not holding and ruling that the same, and the enforcement thereof herein, deprives the plaintiff in error of his liberty and property without due process of law, in violation of the Fourteenth amendment to the Constitution of the United States, and in not on that ground reversing and in affirming the said judgment of the Circuit Court of Cook County.

Third. That said Sections 2, 3 and 4 (except the provisions of Section 4 relating to violations of Section 1), and each of them, of said ordinance of the said City of Chicago, did not deny to any person or to this defendant the equal protection of the laws, as guaranteed by the Fourteenth amendment of the Federal Constitution.

Fourth. That said Sections 2, 3 and 4 (except the provisions of Section 4 relating to violations of Section 1), and each of them, of said ordinance of the said City of Chicago, were valid and not repugnant to or in contravention of Section 1 of the Fourteenth

amendment to the Constitution of the United States, which said Section 1 is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

for which errors, and each of them, the defendant and
209 appellant, Mathias Schmidinger, prays that the said judgment of the Supreme Court of the State of Illinois, dated June 29, 1910, be reversed and a judgment rendered in favor of the defendant and appellant, Mathias Schmidinger, and for costs.

RUBENS, FISCHER & MOSSER,
JOHN S. MILLER,
Attorneys for Defendant and Appellant,
Mathias Schmidinger.

210 Be it remembered, to-wit on the 26th day of July A. D. 1910, there was duly filed by appellant Mathias Schmidinger in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. Alonzo K. Vickers, Chief Justice of the Supreme Court of Illinois, with the endorsement by the Chief Justice upon said petition allowing said writ of error, which documents are in words and figures as follows to-wit:

211 Bt it also remembered that on the 26th day of July A. D. 1910, an order was duly entered of record by the Hon. Alonzo K. Vickers, Chief Justice of the Supreme Court of the State of Illinois, allowing said writ of error and approving bond for writ of error, in words and figures as follows, to-wit:

212 *Petition for Writ of Error.*

Filed Jul- 26, 1910. J. McCan Davis, Clerk of Supreme Court.

Supreme Court of Illinois.

7245.

CITY OF CHICAGO, a Municipal Corporation, Plaintiff,
vs.
MATHIAS SCHMIDINGER, Defendant.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the defendant hereby prays a writ of error from the said

decision and judgment, to the U. S. Supreme Court, and an order fixing the amount of a supersedeas bond.

RUBENS, FISCHER & MOSSER,
Attorneys for Defendant.

Assignment of errors herewith.

STATE OF ILLINOIS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Mathias Schmidinger to the City of Chicago, in the sum of Five
213 hundred Dollars; such bond, when approved, to act as a supersedeas.

Dated, July 26" 1910.

ALONZO K. VICKERS,
Chief Justice Supreme Court of Illinois.

214 Be it remembered that on the 26th day of July, A. D. 1910, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Mathias Schmidinger, appellant, an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in words and figures as follows to-wit:

215 *Bond.*

Filed Jul- 26, 1910. J. McCan Davis, Clerk of Supreme Court.

MATHIAS SCHMIDINGER, Plaintiff in Error,
vs.
CITY OF CHICAGO, a Municipal Corporation, Defendant in Error.

Know all men by these Presents, that we, Mathias Schmidinger, as principal, and American Surety Company of New York as surety, are held and firmly bound unto the City of Chicago, Illinois, in the sum of Five Hundred Dollars ($500.00) to be paid to the said City, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated, this 26th day of July, 1910.

Whereas, the above named Plaintiff in Error seeks to prosecute his writ of error to the U. S. Supreme Court, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Illinois.

Now therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute his said writ of error to effect, and answer all the costs and damages that may

be adjudged if he shall fail to make good his appeal, then
216 this obligation to be void; otherwise to remain in full force and effect.

MATHIAS SCHMIDINGER. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK, [SEAL.]
By R. RUBY, *Res. Vice-Pres't.*

Attest:
ROBERT BENNETT,
Res. Ass't Sec'y.

Bond agreed to be satisfactory.
EDWARD J. BRUNDAGE,
Attorney for Defendant in Error.

Bond approved and to operate as a supersedeas.
Dated, July 26th 1910.

ALONZO K. VICKERS,
Chief Justice, Supreme Court, Illinois.

217 Be it remembered, that on the 29th day of July A. D. 1910, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error which is hereby attached and is in words and figures as follows, to-wit:

218 *Writ of Error.*

Filed Jul- 29, 1910. J. McCan Davis, Clerk of Supreme Court.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between the City of Chicago, Illinois, and Mathias Schmidinger, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title,

219 right, privilege or exemption specially set up or claimed under such clause of the Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said Mathias Schmidinger, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan Senior Associate Justice of the Supreme Court of the United States, the 28th day of July, in the year of Our Lord, One Thousand Nine Hundred and Ten.

[The Seal of the Circuit Court of the United States, South. Dist. Ill.]

JAMES T. JONES,
Clerk of the Circuit Court of the United States,
Southern District of Illinois.

Allowed:

July 28th 1910.

ALONZO K. VICKERS,
Chief Justice Supreme Court of Illinois.

220 *Certificate of Lodgment.*

STATE OF ILLINOIS,
Supreme Court, ss:

I, J. McCan Davis, Clerk of the said Supreme Court, Do Hereby Certify that there was lodged with me as such Clerk on the 29th day of July A. D. 1910 in the matter of Mathias Schmidinger Appellant vs. City of Chicago, a municipal corporation, Appellee, No. 7245.

1. The original bond of which a copy is herein set forth.

2. Copies of writ of error as herein set forth, one for defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 29th day of July A. D. 1910.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

221 *Citation.*

Filed Jul- 29, 1910. J. McCan Davis, Clerk of Supreme Court.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Chicago, Illinois, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Illinois, wherein Mathias Schmidinger is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Illinois, this 26" day of July, 1910.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

ALONZO K. VICKERS,
Chief Justice Supreme Court of Illinois.

Attest:
J. McCAN DAVIS,
Clerk of the Supreme Court of Illinois.

222 CHICAGO, ILLINOIS, *July 26th,* 1910.

I, Edward J. Brundage, Attorney of Record for the Defendant in Error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

EDWARD J. BRUNDAGE,
Attorney for the City of Chicago.

223 *Return to Writ.*

UNITED STATES OF AMERICA,.
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Illinois in the City of Springfield, this 29th day of July A. D. 1910.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

Costs of Suit.

Plaintiff's Costs $9.80, paid by Mathias Schmidinger.
Defendant's Costs $11.50, paid by Mathias Schmidinger.
Costs of Transcript $90.00, paid by Mathias Schmidinger.

J. McCAN DAVIS, *Clerk.*

224 Supreme Court of the United States.

No. 667.

MATHIAS SCHMIDINGER, Plaintiff in Error,
vs.
CITY OF CHICAGO, a Municipal Corporation, Defendant in Error.

Stipulation as to Printing Record.

It is stipulated and agreed by and between John S. Miller, Counsel for Plaintiff in Error and Edward J. Brundage, Counsel for Defendant in Error, that in order to save expense in the printing of the record herein, the following portions of the record may be omitted in the printing, to-wit:

(1). Omit from the record beginning with the figure "2" in the eleventh line from the bottom of Page 6 to the word "Whereas" in the fifth line from the bottom of Page 9.

(2). Omit beginning with the figure "3" in the ninth line from the Bottom of Page 10 to the first word of the first line of Page 14.

(3). Omit beginning with the figure "4" in the third line from the bottom of page 14 to the first word in the first line of page 19.

(4). Omit beginning with the figure "5" in the first line on Page 20 to the word "Whereas" in the eighth line from the bottom of Page 23.

(5). Omit beginning with the figure "6" in the first line of Page 25 to the word "Whereas" in the eighth line from the bottom of Page 28.

225 (6). Omit beginning with the figure "7" on Page 29 to the word "whereas" in the twelfth line from the bottom of Page 32.

(7). Omit beginning with the figure "8" in the seventh line from the bottom of Page 33 to the word "whereas" in the twelfth line from the bottom of Page 37.

(8). Omit beginning with the figure "9" in the first line of Page 39 to the word "whereas" in the twelfth line from the bottom of Page 42.

(9). Omit beginning with the figure "10" in the first line of Page 44 to the word "whereas" in the tenth line from the bottom of Page 47.

(10). Insert this Note at the bottom of Page 49: "The allegations and matters directed to be omitted from the last nine counts of the declaration are the same allegations and matter contained in the first count as found on Pages 2, 3, 4, 5 and 6."

(11). Omit beginning with the first word on Page 57 to and including the name "Paul Schulze" on Page 57.

(12). Omit beginning with the first word on Page 62 to and including the word "Publication" in the fourteenth line from the top of Page 64.

It is further stipulated and agreed that if from oversight or omission any necessary part of the Record be not thus printed,
226 that the Plaintiff in Error has the right to print, or may be required by defendant in Error to print, any further or additional portions thereof.

Dated, November 7th, 1910.

JOHN S. MILLER,
Counsel for Plaintiff in Error.
EDWARD J. BRUNDAGE,
Counsel for Defendant in Error.

227 [Endorsed:] 667—22,288. No. 667. Supreme Court of the United States. Mathias Schmidinger, Plaintiff in Error, vs. City of Chicago, a Municipal Corporation, Defendant in Error, Stipulation as to Printing Record.

228 [Endorsed:] File No. 22,288. Supreme Court U. S. October Term, 1910. Term No. 667. Mathias Schmidinger, Pl'ff in Error, vs. The City of Chicago. Stipulation as to printing record. Filed Nov. 10th, 1910.

Endorsed on cover: File No. 22,288. Illinois Supreme Court. Term No. 667. Mathias Schmidinger, plaintiff in error, vs. The City of Chicago, Illinois. Filed August 8th, 1910. File No. 22,288.

FILED
NOV 11 1912
JAMES H. MCKENNEY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 115

MATHIAS SCHMIDINGER, PLAINTIFF IN ERROR,

vs.

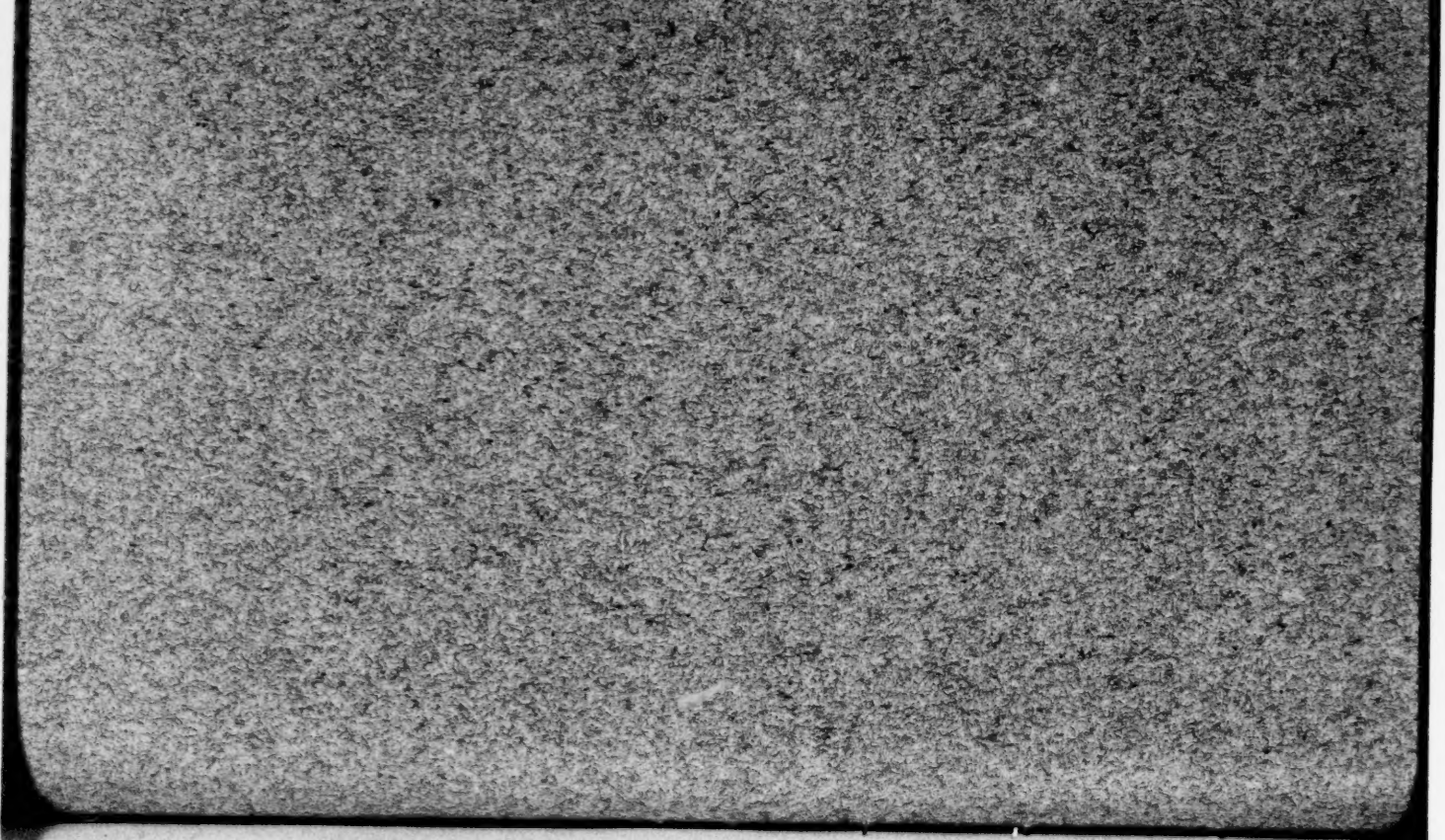
THE CITY OF CHICAGO, ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PLAINTIFF IN ERROR.

HARRY BURNS,
BENJAMIN F. NIBLE,
Counsel for Plaintiff in Error.

[illegible] Gunthrie Printing Co., Chicago.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 115.

MATHIAS SCHMIDINGER, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO, ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

This case calls in question the constitutional validity under the 14th amendment of the Federal Constitution of an ordinance of the City of Chicago regulating the sale and prescribing the weight and quality of bread in the loaf sold or offered for sale within said city. The ordinance which was passed on the 6th day of January, 1908, is as follows (Printed Rec., 3-4):

"An Ordinance regulating the sale and prescrib-

ing the weight and quality of bread in the loaf sold or offered for sale within the City of Chicago.

Be it ordained by the City Council of the City of Chicago:

Section 1. All bread made or procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago shall be made in a clean and sanitary place of good and wholesome flour or meal, and shall contain no deleterious substance or material.

Section 2. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago shall weigh a pound avoirdupois (except as hereinafter provided) and such loaf shall be considered to be the standard loaf in the City of Chicago. Bread may also be made or procured for the purpose of sale, sold, offered or exposed for sale, in half, three-quarter, double, triple, quadruple, quintuple or sextuple loaves, and in no other way. Every loaf of bread made or procured for the purpose of sale, sold, offered or exposed for sale in the city shall have affixed thereon in a conspicuous place a label at least one inch square or if round, at least one inch in diameter, upon which label there shall be printed in plain type, the letters and figures of which shall be printed in black ink upon white paper from type not smaller or making a less conspicuous letter than the type commonly known as twelve point full face square Gothic capital letters and figures (being substantially such type as is described in Specimen book number 9 of Barnhart Brothers & Spindler, as twelve point Lining Gothic Title number 82, capital letters and figures, and in the specimen book of 1906 of the American Type Founders Company as twelve point lining Gothic number 520, capital letters and figures, or similar type) the weight of the loaf in pound, pounds or fraction of a pound avoirdupois, whether the loaf be a stand-

ard loaf or not. The business name and address of the maker, baker or manufacturer of the loaf shall also be printed plainly on each label.

Section 3. Every maker, baker or manufacturer of bread, every proprietor of a bakery or bakeshop, and every seller of bread in the City of Chicago shall keep scales and weights, suitable for the weighing of bread in a conspicuous place in his bakery, bakeshop or store, and shall, whenever requested by the buyer and in the buyer's presence, weigh the loaf or loaves of bread sold or offered for sale.

Section 4. If any person, firm or corporation shall make or procure for the purpose of sale, sell, offer or expose for sale within the City of Chicago, any bread which is not made of good and wholesome flour or meal, and bread which contains a deleterious substance or material, any bread the loaf or loaves of which are not standard half, three-quarter, double, triple, quadruple, quintuple, or sextuple loaves as defined in section 2 of this ordinance, or any bread which is not made in a clean and sanitary place, or shall make or procure for the purpose of sale, sell, offer or expose for sale, within the City of Chicago any standard loaf or loaves of bread which do not weigh one pound each, or any bread the loaf or loaves of which do not weigh as much as the weight marked thereon, or any bread the loaf or loaves of which do not have affixed thereon the label marked as hereinbefore provided, contrary to the provisions of this ordinance, such person, firm or corporation shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

Section 5. The provisions of this ordinance other than the provisions of section 1 and section 4 (so far as section 4 relates to violations of section 1) shall not apply to crackers, pretzels, biscuits, buns, scones, rolls or loaves of fancy bread weighing less than one-fourth of a pound avoirdupois, or to what is commonly

known as 'stale bread' sold as such, provided the seller shall at the time of sale, expressly state to the buyer that the bread so sold is stale bread.

Section 6. Sections 184, 185 (as amended October 16, 1905), 186, 189, 190 and 191 of Chapter XIII of the Revised Municipal Code of Chicago of 1905 are hereby repealed.

Section 7. This ordinance shall be in force on and after its passage and publication."

Said ordinance being in full force and effect, the City of Chicago instituted suit (Printed Record, 2-9) in the Circuit Court of Cook County, Illinois, against the plaintiff in error to recover from the latter certain penalties for ten separate alleged violations by him of the provisions of said ordinance. On the trial of the case in said Circuit Court, the defendant in error offered said ordinance in evidence, to which offer the plaintiff in error objected, on the ground that said ordinance violated and was repugnant to the provisions contained in the 14th amendment of the Federal Constitution. (Printed Record, 18.) At the close of the evidence, the plaintiff in error asked the court to hold as a proposition of law that said ordinance was violative of the provisions contained in the 14th amendment of the Federal Constitution (Printed Record, 103) and on the first trial of the case the court did so hold and rendered judgment against the defendant in error. (Printed Record, 10-11.) The defendant in error appealed the case to the Supreme Court of Illinois, the highest court of the state, which court held (Printed Record, 109-113) that said ordinance did not violate the 14th amendment of the Federal Constitution, reversed the

judgment and remanded the case to said Circuit Court.

On the second trial of the case in said Circuit Court, the plaintiff in error again objected (Printed Record, 18) to the introduction in evidence of said ordinance, on the ground that it was violative of and repugnant to the 14th amendment of the Federal Constitution and at the close of the evidence submitted to the court a proposition of law (Printed Record, 103) raising said constitutional question, but the Circuit Court, following the decision of the Supreme Court of Illinois, held that the ordinance did not violate the 14th amendment and rendered judgment against the plaintiff in error. (Printed Record, 13-14.)

Plaintiff in error in his motion for a new trial (Printed Record, 104) in said Circuit Court assigned as one of his reasons therefor that said ordinance violated and was repugnant to the 14th amendment of the Federal Constitution. Also in his assignment of errors (Printed Record, 106) on appeal to the Supreme Court of Illinois, the plaintiff in error made the same constitutional objection to said ordinance, and that court overruled said objection and affirmed (Printed Record, 117-118) the judgment of the Circuit Court.

Throughout the entire case in both courts the plaintiff in error properly preserved the question whether said ordinance, was violative of and repugnant to the Constitution of the United States, and the decision of the Supreme Court of Illinois being in favor of the validity of said ordinance

and a final judgment of the highest court of the state in which a decision in the suit could be had, this writ of error was duly allowed by the Chief Justice of the Supreme Court of Illinois. (Printed Record, 124.)

Omitting all formal allegations contained in the declaration (Printed Record, 2-9) its ten counts may be grouped as follows:

(1) The *first* count alleges the *selling* and the *sixth* count the *making* of a standard loaf of bread of *one pound*, the exact weight prescribed by the ordinance. In both counts it is alleged that

> "there was *not* affixed a label at least one inch square or a round label at least one inch in diameter as provided in any by section 2 of said ordinance; in violation thereof."

(2) The *second* count alleges the *selling* and the *seventh* count the *making* of loaves of bread weighing *fifteen ounces*. Both of said counts allege that there were affixed to said loaves labels as follows: "15 OUNCES," on which were printed the business name and address of the maker of said loaves.

(3) The *third* count alleges the *selling* and the *eighth* count the *making* of loaves of bread weighing *one and one-half pounds*. Both counts allege that said loaves had affixed thereon labels as follows: "1½ POUNDS," on which were printed the name and address of the maker.

(4) The *fourth* count alleges the *selling* and the *ninth* count the *making* of loaves of bread weighing *seven pounds*. Both counts allege that there were affixed to said loaves labels as follows: "7 POUNDS,"

on which were printed the business name and address of the maker.

(5) The *fifth* count alleges the *selling* and the *tenth* count the *making* of loaves of bread weighing *one pound*. Both counts allege that there were affixed to said loaves labels on which were printed the business name and address of the maker, but upon which labels there was *not* printed the weight of said loaves of bread.

The declaration contains not a single count charging that plaintiff in error made or sold a loaf of bread with a label indicating a weight larger than its actual weight.

To sustain these charges made in the ten counts of the declaration defendant in error introduced in evidence a certified copy of said ordinance and it was stipulated (Printed Record, 16-17) between the parties that said ordinance had been passed by the City Council of Chicago and was in full force and effect as alleged and that plaintiff in error was engaged in the business of a baker and did make, procure for the purposes of sale, sell, offer and expose for sale said several loaves of bread at the time and in the manner as alleged in the several counts of the declaration. The defendant in error introduced *no other evidence* of any kind in the case to maintain the issues on its part, therefore the evidence introduced by the plaintiff in error is not contradicted and conclusively establishes the following facts:

(1) The bakery business in the City of Chicago is carried on by between eight hundred and one thousand professional bakers, who are in keen competi-

tion with each other. Some of these bakeries turn out over fifty thousand loaves of bread per day. Many of the bakeries sell bread in all parts of the city. Bread from other cities and places outside of Chicago is also brought into the city and sold there. (Printed Record, 19, 20.)

(2) Only about fifty per cent. of the bread consumed in Chicago is produced by professional bakers. The other fifty per cent. is produced by housewives, restaurants, hotels and groceries. (Printed Record, 102.)

(3) Bread in the shape of crackers, biscuits, etc., is a competitor of loaf bread. (Printed Record, 28.)

(4) Bread *is not now, nor was it ever, sold in the City of Chicago by weight. It was and is only sold according to price.* (Printed Record, 37-38.)

(5) Outside of the restaurant business, about *ninety-five per cent. of the loaf bread sold in Chicago is sold in loaves costing five cents or multiples thereof.* Of this ninety-five per cent., eighty-five per cent. is the proportion that is sold at five cents. Of these five-cent loaves, one baker alone sells *fifteen different kinds.* (Printed Record, 102-103.)

(6) There is no territory in Chicago in which more than sixty per cent. of the bread sold is sold in rectangular loaves (like Ex. K), the other forty per cent. being sold in loaves of other shapes. (Printed Record, 39-40.)

(7) There are so many shapes and qualities and sizes of loaves sold in Chicago that there is no "standard" loaf. (Printed Record, 38.)

(8) The weight of bread in the loaf varies and is adjusted in accordance with the fluctuations in the price of raw material, labor and other elements of expense of production, the different qualities of the bread, and the competition between the bakers among themselves and with the households, restaurants, hotels and other breadmakers. (Printed Record, 27, 37-38.)

(9) *There is a large demand in Chicago for bread of weights substantially differing from the weights fixed by the ordinance.* (Printed Record, 37.)

(10) Most of the bread made by the largest manufacturers of bread weighs about fourteen ounces when it is baked. (Printed Record, 32.)

(11) *In the ordinary course of business, bread made for restaurant use is required to be made in loaves substantially different in weight from the weights prescribed by the ordinance.* One baker alone has a daily demand for from seven to eight hundred loaves of bread weighing one pound and eight ounces, of seventy-five loaves a day of bread weighing one pound, nine ounces and a half, and of a thousand loaves a day of bread weighing one pound, ten ounces and a half. (Printed Record, 83-89.) All this bread is sold without reference to weight, and merely with reference to size and shape, *as the restaurant trade requires bread that will cut up with as little waste as possible and to fit the cutting machines.* (Printed Record, 88.) While it is mechanically and theoretically possible to make almost any quality of bread in loaves of almost any sizes or shapes, and of almost any weights, at a

particular time, the ordinary demands of many consumers of bread require sizes of loaves in weights substantially different from the weights prescribed by the ordinance. (Printed Record, 88-91.)

(12) *Loaves of bread weighing seven pounds and more are in common demand in various parts of the city.* (Printed Record, 50, 52.)

(13) From the time that a loaf of bread leaves the oven until it becomes absolutely dried out, there is a constant shrinkage of weight, caused by the evaporation of the moisture in the bread, the amount of which shrinkage depends upon the quality and size of the loaf, the atmospheric condition, and the dryness and temperature of the place where it is kept. (Printed Record, 22-23.)

(14) While it is *theoretically* possible to scale the dough made out of the same quality of flour so carefully that when baked the loaves will be of uniform weight, it is *practically* impossible, because of the technical difficulty of exact scaling (irrespective of unavoidable carelessness), the uneven temperature prevailing in the bake oven, and the different length of time in which loaves of the same charge will remain in the ordinary bake oven in common use; and it is absolutely impossible to bake loaf bread which will preserve the same weight from the time it leaves the oven for hours thereafter. (Printed Record, 34-36.)

(15) The *term "stale bread" has no definite common or accepted meaning*, either according to the usages and customs of the bakery business in the City

of Chicago, or according to the general opinion of the consumers. The question whether bread is "stale bread," or not, is dependent upon the opinions, judgments, tastes and eating habits of the various people composing the conglomerate population of Chicago, and the rapidity of the process of becoming stale depends entirely upon the size and quality of the loaf, the atmospheric conditions, the dryness and temperature of the place in which it is kept, and the condition in which it came from the oven as to the thoroughness with which the dough has been baked. According to the testimony, the lapse of time in which loaf bread of different qualities and sizes will become stale, in the reasonable opinion of various people, varies from twenty-four hours to one week. (Printed Record, 22, 36-37.)

(16) The weight of a loaf of bread alone does not indicate the amount of nutriment contained therein, nor its value or cost of production. The same bakery sells bread for five cents, weighing only fourteen ounces, at the same profit at which it sells bread for five cents, weighing nineteen ounces. (Printed Record, 82.)

(17) This ordinance is the only legal enactment in force in the City of Chicago, state or municipal, requiring any article of foodstuff or any other commodity whatsoever to be contracted for, bargained or sold according to any definite weight, size or measurement, and a large number of foodstuffs are ordinarily sold by the package or piece, irrespective of any definite weight, size or measurement. (Printed Record, 65.)

Further, what was tantamount to a stipulation (Printed Record, 69, 70) between the parties in regard to some of the facts was made in the course of the trial of the case. Counsel for plaintiff in error stated that he could narrow down the limits of the testimony if he knew what facts could be admitted as true. He stated that he wanted to establish the following points:

(1) That the bakery business is in no way a monopoly, nor affected with a public interest; that is, it is not a business in which there is no competition. It is in competition with the ordinary cook stoves of the ordinary household.

(2) That there is no possibility of exactly measuring the weight of bread as it leaves the oven.

(3) That there is no possibility of exactly determining the shrinkage in the weight of bread, because that shrinkage is dependent, even as long as anybody will call the bread fresh bread, upon temperature, moisture, mode of keeping, quality of bread, size of loaf, etc.

(4) That there is no such thing as bread that is commonly called stale bread, because there is no consensus of opinion in the trade, or otherwise, as to when a certain loaf of bread is stale bread.

Counsel for defendant in error, in reply, stated that the testimony introduced, if it had any materiality, was *practically correct*, and that he might call a witness on the question of the possibility of scaling a loaf more accurately.

As before stated, defendant in error introduced

no further testimony to contradict or vary the facts set forth in said stipulation.

II.

SPECIFICATIONS OF ERRORS RELIED UPON.

While other errors have been assigned (Printed Record, 119-121), the only one relied upon in this court is that the Supreme Court of Illinois erred in not holding and ruling that Sections 2, 3 and 4 of said ordinance and each of them deprives the plaintiff in error of his liberty and property without due process of law in violation of the 14th amendment to the Constitution of the United States and in not on that ground reversing and in affirming the judgment of the Circuit Court of Cook County.

III.

BRIEF OF THE ARGUMENT.

THE PROHIBITION OF THE MAKING OF LOAF BREAD IN WEIGHTS SUCH AS WERE IN LARGE DEMAND AT THE TIME OF THE PASSAGE OF THE ORDINANCE IN QUESTION IN THE ORDINARY AND CUSTOMARY COURSE OF BUSINESS, AND IN WEIGHTS WHICH ARE NECESSARY TO SATISFY REASONABLE AND LEGITIMATE BUSINESS REQUIREMENTS, ALTHOUGH THE LOAVES ARE LABELED IN ACCORDANCE WITH THEIR EXACT WEIGHT, AND THEREFORE NO FRAUD IS ATTEMPTED, UNREASONABLY, ARBITRARILY AND UNNECESSARILY INTERFERES WITH THE LEGITIMATE PURSUIT OF AN ORDINARY, PRIVATE AND USEFUL BUSINESS AND WITH THE RIGHT OF CONTRACTING IN RELATION THERETO. IT THUS DEPRIVES THE PLAINTIFF IN ERROR OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND VIOLATES THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

City of Buffalo v. *Collins Baking Co.*, 39 N. Y. App. Div. Rep., 432.

Lochner v. *New York*, 198 U. S., 45, 64.

IN WHATEVER LANGUAGE A LAW MAY BE FRAMED, ITS PURPOSE MUST BE DETERMINED BY ITS NATURAL AND REASONABLE EFFECT, AND THE PRESUMPTION THAT IT WAS ENACTED IN GOOD FAITH CANNOT CONTROL THE DETERMINATION OF THE QUESTION WHETHER IT IS OR IS NOT REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES. THE POLICE POWER CANNOT BE PUT FORWARD AS AN EXCUSE FOR OPPRESSIVE AND UNJUST LEGISLATION.

Minnesota v. *Barber*, 136 U. S., 313.

Brimmer v. *Rebman*, 138 U. S., 78.
Yick Wo v. *Hopkins*, 118 U. S., 356.
Lochner v. *New York*, 198 U. S., 45, 64.

A.

Analysis of the ordinance as interpreted by the Supreme Court:

No complaint is here made of the sanitary provisions of the ordinance; nor of the requirements that all bread sold or offered for sale shall have affixed a label correctly designating its weight, and that every proprietor of a bakery and every seller of bread shall keep scales and weights suitable for the weighing of bread and shall, upon request, weigh the loaf or loaves of bread sold or offered for sale.

These provisions are legitimate and appropriate regulations for the protection of the health and for the prevention of imposition and fraud. The ordinance is attacked on the ground that it limits the sale of loaf bread in the City of Chicago to loaves of the weights therein prescribed, prohibits the sale of loaves in weights substantially differing from those weights not only at retail in the shops patronized by the ordinary consumer, but also prohibits the making of contracts by the baker with his customer for large quantities of loaf bread, not for resale in the loaf but for restaurant and hotel use, in weights other than those fixed in the ordinance.

This is clearly the construction placed upon the ordinance by the Supreme Court of Illinois when it said:

"We think the fact that the ordinance fixes

> the size of the loaves which may be sold and prohibits the sale of bread in loaves of other sizes does not render the ordinance void for unreasonableness. The ordinance is a police regulation, and the regulation of the size of the loaf or loaves which it provides may be manufactured and sold is a legitimate exercise of the police power and within the discretion of the legislative body of the cities and villages of this state." (Printed Record, p. 112.)

It is true that in a subsequent paragraph of the opinion the court uses this language:

> "There is nothing in the ordinance which limits the weight of a loaf to a pound or a fractional part of a pound or the multiple of a pound. The ordinance was passed with the view only to prevent the sale of loaves of bread which were short in weight." (Printed Record, p. 113.)

But it is apparent from the holdings of the court in the previous and in prior paragraphs that what the court meant was, that no offense is committed if the weight of a loaf conforms *substantially* to one of the prescribed weights and but slightly *overruns them*, as this must necessarily be the case in order to have loaves of the prescribed weights from the time they leave the oven up to the time at which they are sold. Any other interpretation of the meaning of the court would lead to an absurdity. If the literal meaning of the language were to be adopted, then loaves of bread could be sold in any size provided that size was in excess of the smallest size prescribed by the ordinance, and as long as the label indicated a weight less, no matter how grossly, than the actual weight no violation of the ordinance would have taken place. If such were the proper interpretation of the construction of the

ordinance on the part of the Supreme Court, then the ordinance would clearly be void, as the requirements of the ordinance concerning the labeling of the bread would be of no purpose whatever and would merely be vexatious annoyances of a legitimate and useful business. The labeling provisions would be utterly absurd if they could be complied with by indicating on a loaf of bread weighing five pounds and fifteen ounces a weight of eight ounces—the smallest loaf permitted by the ordinance.

> "The opinion and decision of a court must be read and examined as a whole in the light of the facts upon which it is based and not applied by picking out particular parts or sentences." (26 Am. & Eng. Enc. of Law, 169 b-1.)

Again, the plaintiff in error was charged with and found guilty of making and selling bread in loaves *in excess* of the prescribed weights, although correctly labeled as to the actual weight thereof and otherwise in accordance with the ordinance, and the judgment finding him so guilty was the judgment affirmed by the Supreme Court.

B.

The Precedents Relied Upon.

In its opinion, the Supreme Court disposes of the constitutional objection without much discussion, by saying:

> "This court has held that the disposition of property may be limited or regulated, where the public interest requires that its disposition should be limited or regulated, and the legislature in the City and Village Act * * * provided, in enumerating the powers of the cities

> * * * of this state, that they shall by ordinance have the right to regulate the sale of bread and to prescribe the weight and quality of bread in the loaf. We are therefore of the opinion that the ordinance in question cannot be said to be unconstitutional on the ground that the legislature is powerless to authorize the cities * * * of this state * * * to determine by ordinance the weight * * * of bread in the loaf offered for sale or sold in such municipalities. The power to regulate the sale and determine the weight of bread in the loaf when offered for sale, as a legitimate exercise of the police power by such municipalities as the plaintiff, has uniformly been recognized by the courts, and the exercise of such power is now too firmly established to be challenged." (Printed Record, p. 111.)

The cases cited by the Supreme Court in this connection are seven in number. They include cases which may properly be divided into two classes: *First*, cases in which it is held that the bakery business is, or at least was at the time these cases were decided, a business affected with a public interest to such an extent as to justify the regulation of the *price* of the commodity produced in that business;

Second, cases in which it was held that under the peculiar facts upon which these cases arose it was a legitimate exercise of the police power to prescribe the definite weights of all loaf bread sold in the respective municipalities, without any attempt to fix the price.

A brief analysis and discussion of these cases appears to us to be imperative.

(1) *The right to regulate and fix the* PRICE, *and in connection therewith, the weight of loaf bread.*

The *first* of the cases cited belonging to the first class is the case of

Munn v. *The People*, 69 Ill., 80.

This is the well-known public warehouse case, which later was brought to this court. (*Munn* v. *Illinois*, 94 U. S., 113.) The opinion of the Supreme Court of Illinois was rendered in 1873, almost forty years ago. In discussing the question whether the state had the power to regulate the charges of public warehouses in Chicago, the court refers by way of illustration to the old and common regulations of the price of bread prevailing in former times when it says:

> "Familiar instances are found in regulating public ferries and public mills and fixing the compensation in the shape of toll. Another is in delegating power to the municipal bodies to regulate charges of hackmen and draymen and the weight and *price* of bread." (p. 91.)

The same illustration is used by Mr. Chief Justice Waite in delivering the opinion of this court. The question of the power of the state to fix the price of bread, and incidentally thereto and as the only feasible method of adjusting price to quantity, the weight of loaf bread, or the power of the state arbitrarily to fix the weights in which loaf bread may be sold, disconnected from any provisions concerning the price, was not at issue in the Munn case, and the references to the bakery business by the Supreme Court of Illinois and by this court in

the Munn case were merely made *arguendo*, and are of course *obiter dicta*.

The *second* case of that group cited in the opinion of the Supreme Court of Illinois is the case of

Guillotte v. *City of New Orleans*, 12 La. Ann., 432.

In that case, decided by the Supreme Court of Louisiana in 1857, long prior to the adoption of the Fourteenth Amendment, the court passed upon an early ordinance of the city *enacted at the beginning of the last century*. The ordinance was a regular old-fashioned bread assize ordinance, and we print its text in full in the appendix of this brief. It should be remarked, at the outset, that the Constitution of the State of Louisiana then in force contained *no* provisions similar to those embodied in the Fourteenth Amendment to the Constitution of the United States. It must also be remembered that that ordinance, by express provision, exempted from its operation "*bread made to order*," and, therefore, could not be held to be violative of the right of contract, even if the Constitution of Louisiana then in force had been identical in its restrictions and safeguards with the Fourteenth Amendment.

The ordinance under consideration in that case was based upon the old Louisiana statutes of 1807 and 1814, giving the municipality the express power not only to regulate the price of *baker's bread*, but also of *butcher's meat*, as well as upon the statutes of 1816, conferring upon the municipality the power

> "to regulate everything which relates to *bakers, butchers*, * * * horse drivers, water car-

riers, and slaves employed as *day laborers*, to fix the *salaries* of said * * * horse drivers, water carriers and *day laborers.*" (p. 433.)

The constitutional questions raised in the case were confined to the Sixth Amendment of the Constitution of the United States, and to the provisions of the Louisiana constitution in force at that time, prohibiting legislation impairing the taking of private property for public use, and the impairment of the obligation of contracts. There was, of course, no force whatever in the contention that the ordinance in question conflicted with those constitutional restrictions. The federal constitution, in its provisions concerning searches and seizures, related only to searches and seizures made under federal authority, and, as the ordinance expressly exempted from its operation "*bread made to order*," there was, of course, no force in the contention that the ordinance impaired the obligation of contracts.

The observations of the court on page 435 deserve to be noticed in this connection:

> "Now, when the law giver says to the baker, 'you shall not make and sell bread within certain boundaries unless you limit your profits to a certain sum for each barrel of flour which you make into bread, and unless you conform to certain regulations as to the size of the loaves, the places and times of sale,' the obligation of no contract has been impaired, for none has been entered into; no vested right has been taken away, for *no man has a vested right (unless the same be expressly granted by a special act of the legislature) to furnish a certain portion of the population with bread*, and no tax has been levied upon the baker, for no part of the price of the bread goes into the public treasury, and *it is en-*

tirely optional with him whether he will sell his flour or make it into bread, or pursue some other vocation."

But the ordinance itself, under consideration by the court, had all the virtues of a well considered assize ordinance. It had proper regard for the relative effect upon each other of the elements of price and weight and quality and the cost of raw material, and provides a frequent adjustment of weights in accordance with the fluctuations of the market.

This early Louisiana case should therefore receive only very little, if any, weight in the consideration of the case at bar. It merely decides that the bakery business as carried on in the City of New Orleans at the beginning of the last century when the ordinance in question was enacted, and at the time of the rendering of the decision, which was also prior to the war of the rebellion, at a time when the laboring population of New Orleans was largely consisting of negro slaves, and before the general introduction of the modern cooking stove with its efficient bake oven suitable for the baking of loaf bread, was affected with a public interest to such an extent as to justify a periodical assize of bread; that is, a periodical limitation of the price of bread to be exacted by the bakers, and as a necessary incident thereto, an adjustment of the weight of the loaves, with due regard, however, to the right of the people to procure, and the right of the baker to furnish, loaf bread at different prices and weights by special contract. The ordinance has, of course, been abandoned a long time ago, no assize of bread has taken place in New Orleans for sev-

eral decades, and in lieu of this old assize ordinance, modern ordinances have been enacted regulating the business of the baker in regard to sanitary features and the like.

The *third* of the cases of the *first class* relied upon by the Supreme Court of Illinois as one of the guiding precedents is the case of

Mayor v. *Yuille*, 3 Ala., 137.

The ordinance under consideration in that case was passed January 28, 1826, almost a century ago. This ordinance, like the New Orleans ordinance, was a regular old fashioned bread assize ordinance. The price of bread was taken as the standard, and weight and quality adjusted in accordance with the fluctuations of the market. The case turned upon the question whether the business of the baker in those days, and in that community (Mobile in 1826 when the ordinance was passed and in 1841 when the case was decided) was affected with a public interest, and, in line with the old English bread legislation on the subject, made at times and under conditions radically different from those of the present day, the court came to the conclusion that it was. The reasoning of the court, however, in coming to the conclusion, is of interest. We quote from page 141:

> "Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to

the voluntary acts of individuals. *By this means a constant supply is obtained without fluctuation in quantity which would be the inevitable result of throwing the trade entirely open and the consequent rise in price, when from accident or design a sufficient supply was not produced.* The interest of the city in always having an abundant supply will be a sufficient guaranty against any abuse of the right to regulate the weight, the consequence of which would be to drive the baker from the trade."

The ordinance in question has, of course, been repealed, and the city of Mobile has long since freed itself from the bonds of such antiquated enactments.

The three cases above discussed relate to businesses affected with a public interest.

As long as the habitations of the masses in the cities were such as to render the baking of loaf bread impracticable and making them dependent upon the bakers for their supply of that necessity of life, it could truthfully be claimed that the business of the baker, although not being a *legal* monopoly, yet by force of circumstances, as a matter of fact, was *practically* a monopoly, was a business affected with a public interest and, therefore, a proper subject of state regulation, irrespective of the exercise of the ordinary police power of the State on the subjects of the public health, public safety and the suppression of imposition and fraud.

Such were the conditions in olden times; such were the conditions in England and on the continent. In smaller towns and villages, municipal bake ovens were established, to which the housewives brought their dough, to be turned into loaf bread. The old

fashioned fireplaces, the only cooking appliances accessible to the common people, were certainly not proper contrivances for the baking of loaf bread. Only the farmers and the well-to-do in the cities could afford bake ovens. The people living in the tenements and in the hovels were dependent upon the baker.

Such were the conditions, particularly in the early part of the last century, in the cities of the south, and where the climatic conditions were also unfavorable to the baking of bread in the habitations of the poor, such as they were.

At the beginning of the nineteenth century the big fireplace in the living room, serving as kitchen and dining room, commonly served for cooking and heating both. Hinged to the right hand jamb was an iron crane filled with dangling pot hooks. It was pulled out so that pots and kettles might be hung on the hooks and the crane was then hung back over the blazing fire. Potatoes were baked in the hot ashes. In the wall alongside the fireplace was built the brick oven, with its flat bottom and arched top, having an iron door in front. On baking day a wood fire was built inside of this oven, and when it was burned to coals and the oven thoroughly heated, the fire was neatly removed and the bread placed on the oven bottom. But there was no room in the hovels and tenements of the poor for ovens, and the generous fireplace, with oven attachment, was one of the privileges of the few, in the large cities.

But these conditions have ceased to exist, both here and abroad, North and South. The revolution-

ary change in the condition of the bakery business has been brought about by the invasion of the modern cook stove, with its efficient bake oven. It was the Conant stove, first made at Brandon, Vermont, in 1820, which drove out the fireplace as a cooker and provided an oven above the fire, with a door in both ends, the front one being over the fire door. Important as this invention was, it took many years before it was put into general use, and was brought to the present state of perfection by such men as J. C. Hathaway, in 1837, and P. P. Stewart in 1838 and 1850. To-day there is practically no household in the United States without a cookstove, containing an efficient oven, capable of baking good loaf bread. The business of the baker has ceased to be a virtual monopoly, not merely because of the great competition among the bakers themselves, the small capital required to enter into the business, and the comparative simplicity of the machinery and other appliances required to carry on the trade in an ordinary way, but also—and mainly—because every household now has a cook stove and thereby is in active competition with the baker. The record in this case shows that there are between eight hundred and a thousand bakers in the City of Chicago, but altogether they produce *only one-half* of the loaf bread consumed, and the record further shows that in the winter time, when the cook stove is also used for heating purposes, and its operation is less obnoxious because of the cooler weather, the trade of the professional bakers shows a falling off of about sixteen per cent.

How different the business of the baker when com-

pared with that of the butcher or the milkman! Bread can now be made in every household, but meat and milk cannot be produced in the homes of the crowded cities. If there is any business, which is neither in law or in fact, a monopoly, and which is exposed to the keenest and most general competition, it is the business of the baker. To say that *to-day*, under conditions as they *now* pervail in America, and in the City of Chicago, it is a business affected with a public interest, or devoted to a public use, is to make a statement in the teeth of the actual conditions as they are open to the observation of everybody. The business of the baker enjoys no special privileges or franchises, it has no special rights in the public streets or on the public highways, it does not depend upon the legislative will for its existence or enjoy special rights or protection, and, beyond all question, it is certainly not a *monopoly*.

There is no hard and fast rule in American jurisprudence as to the exact subject matters amenable to State regulation on the ground that they are affected with a public interest. In the evolution of our civilization and in the never ending kaleidoscopic change of conditions, a business which to-day is in no respect whatever affected with a public interest, and, therefore, on that ground alone, not subject to legislative control and regulation, may be so clearly affected with a public use ten years hence, by force of a change of conditions, that it may be confessedly a legitimate subject for such control and legislation. Again, a business which, years ago, because of conditions then existing, was, as a matter of fact, affected with a public interest,

and was justly so held to be by the courts, under circumstances as they then prevailed, may to-day, under an entirely different state of business development, be so clearly a mere private calling, entirely unaffected with any public interest, in the true sense of that term, as to render any attempt at State regulation of that calling *on that ground* absolutely unjustifiable and absurd. The hard and fast rule does not apply to the subject matter, but to the legal principles called into operation. The business of warehousing was not a business affected with a public interest in the early days, but got to be so in the course of time, and then the Supreme Court of Illinois and the Supreme Court of the United States properly and justly declared it to be a business affected with a public interest and subject to State control. *Munn* v. *People,* and its doctrines, could have had no application to the early old fashioned warehouses of Chicago as then operated. The business of news gathering was certainly never held to be a business devoted to a public use, but when a private corporation like the Associated Press became as powerful, important, and *indispensable* as a news gatherer, as it has done in late years, the Supreme Court of Illinois, because of the changed condition, declared that that business, although formerly merely a private enterprise, had become, in the course of time, a quasi-public business devoted to a public use, and could, therefore, make no discrimination against persons or corporations who wished to purchase, for purposes of publication, its news and information. And on the other hand the business of the making of bread,—undoubtedly in

olden times, and especially when its exercise was dependent upon grants and franchises, a business affected with a public interest, is, because of the radical change in the conditions affecting it in modern days, no longer a proper subject matter of State control and regulation, upon the theory that it is still affected with a public interest.

Much stress seems to have been laid upon the *obiter dicta* in *Munn* v. *People, supra,* in which the business of the baker—by way of illustration—is mentioned as in the same category with public warehouses, public ferries and the like. We beg to point out that in a case decided by this court as late as 1904, and where the question whether the business of the baker was or was not a business affected with a public interest was more directly at issue than in the *Munn* case, this court, in deciding the New York State law regulating the hours of bakers to be unconstitutional, considered such business to be a *private business.* We quote from the opinion of Mr. Justice Peckham, in *Lochner* v. *People,* 198 U. S., 45, on page 64:

> "It seems to us that the real object and purposes were simply to regulate the hours of labor between the master and his employes, *in a* **private business,** not dangerous in any degree to morals, or in any real and substantial degree to the health of employes."

More convincing, however, than any argument can possibly be, is the fact that not only in the United States, but also in England and on the continent of Europe, legislation tending to fix *the price* of bread *has been universally abandoned many years ago.* If the business of the baker were still a proper subject for governmental regulation of price, would it have

happened that there is not a single state in the Union, not a city in the United States which has not abandoned all effort to bring the price of the commodity of bread under state or municipal control? There must be a reason for this complete turn in legislative policy, a turn which is equally pronounced in the state and municipal legislation of this country, as it is in the state and municipal legislation of England, Germany, and France. While changed conditions have brought (and properly and justly so) vocations under the power of the state which heretofore were considered exempt, other changes in the conditions have operated to free the business of the baker from that state or municipal control and interference which up to the early part of the last century was the universal rule and which universal rule then obtaining was the basis of the *obiter dicta* still to be found in later expressions of the courts. Competition has proven, in this instance, to be a much more efficient factor in keeping the price of bread at a proper level, than any state or municipal regulations could possibly be.

When the Supreme Court of Illinois, in *Munn* v. *People*, *supra*, decided that public warehousemen were subject to legislative control and regulation, they did so on the ground that the legislature had found

> "the owners and managers of these warehouses are an organized body of monopolists, possessing sufficient strength in their combination, and by their connection with the railroads of the State, to impose their own terms upon the producers and shippers of these cereals to the great detriment of the latter, who are under a kind of moral duress in resorting to them."

The undisputed facts relating to the conduct of the bakers' business in Chicago as shown by the record of this case, demonstrate a condition diametrically opposed to those of public warehousemen.

And the Supreme Court of the United States when it reviewed the decision of the Supreme Court of Illinois in that case also found the warehouse business to be a virtual monopoly when it said:

> "Thus it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great States of the West' must pass on the way 'to four or five of the States on the seashore' may be a 'virtual' monopoly. * * * They stand, to use again the language of their counsel, in the very 'gateway of commerce' and take toll from *all* who pass." (*Munn* v. *Illinois*, 94 U. S., 113, 114, 115.)

We respectfully submit that for the reasons above set forth, the *first class or group of cases* cited by the Supreme Court of Illinois in proof of its statement that

> "The power to * * * determine the weight of bread in the loaf when offered for sale, as a legitimate exercise of the police power by such municipalities as the plaintiff, has uniformly been recognized by the courts, and the exercise of such power is now too firmly established to be challenged"

have no application to the case at bar.

(2) *Before entering upon the discussion of the second class* of cases cited by the Supreme Court of Illinois in its decision, we beg to make passing reference to the well established rule that:

> "The language used in the opinion of the court must be construed in the light of the circumstances connected with each case. Its in-

> fluence and weight as a precedent are also largely dependent upon them. The language in argument or findings may have a restricted or enlarged interpretation by reason of its connection with a specific statement of facts. *The facts are the foundation of the entire structure*, which cannot with safety be used without reference to the facts." (26 *Am. & Eng. Enc. of Law*, 2nd Ed., 169 b-1.)

This doctrine is very aptly stated by the Supreme Court of Michigan as follows:

> "The language of a decision is to be construed not as a statement of abstract propositions without limitation, but in connection with the particular facts of the case and the specific matters had in view when the language was used; and when applied to an essentially different state of facts, is to be understood as subject by implication to many limitations and restrictions not expressly stated." (*Holcomb* v. *Bonnell*, 32 Mich., 7.)

And also by the Supreme Court of Mississippi, which uses this language:

> "The opinions of appellate courts are to be considered in connection with and as explained by and *limited to the state of facts* appearing in the record." (*Pass* v. *McRea*, 36 Miss., 143.)

This doctrine is too universally established and recognized by all the courts to justify further citations.

This *second class* of cases cited by the Supreme Court of Illinois comprises a group of cases upholding the validity of certain ordinances or statutes fixing the weight of loaf bread without fixing the price in the exercise of that branch of the police

power which is directed to the suppression of imposition and fraud.

In one of the cases the constitutional question was not raised at all. In another it was not pressed; to use the language of the court in its decision, "it was then not strenuously urged." In another of the cases, *i. e.*, in the case most relied upon as a guiding precedent, the violation of the ordinance in question was purposely committed to invite the prosecution and not because such violation was an incident to the ordinary pursuit of the business of the baker. In *none* of the American cases was the prescription of the weights of loaves coupled with a provision for indicating the weight by way of labeling or stamping (except in regard to loaves of deficient weight), and in *none* of them is there a state of facts discussed similar to the uncontroverted state of facts shown in the record of this case as to the local trade customs and exigencies of the bakery business at the time of the enactment of the ordinances or statutes, respectively, in question.

We shall discuss these cases briefly in their chronological order; that is, with reference to the time when the decisions in question were rendered. The *first* case in that order is the case of

Paige v. *Fazackerly*, 36 Barb., 392.

The decision in this case is *not* a decision by a court of last resort. It was rendered in 1862, prior to the adoption of the Fourteenth Amendment. But, irrespective of that circumstance, on the trial of the case in that court, it became apparent that the con-

tention concerning the unconstitutionality of the ordinance, as violative of the State Constitution, *was practically abandoned*. We quote from page 394:

> "It is safe to say that at the trial none of these objections were properly taken, except the last (the constitutional objection), *which is now not strenuously urged*. There is no doubt that a city ordinance regulating the weight of bread is a valid police regulation. (Laws of 1842, ch. 275, Sec. 29; *Tanner* v. *Trustees of Albion*, 5 Hill, 121; *Mayor of New York* v. *Williams*, 15 N. Y. Rep., 502.)"

We are at a complete loss to understand why the learned judge writing the opinion should have referred in his decision to the cases in 5 Hill and 15 New York cited by him. Neither of these cases has but the remotest (if any) bearing upon the constitutional question involved. In *Tanner* v. *Trustees*, 5 Hill, 121, the only questions under consideration were whether a municipality had the power to make a by-law prohibiting the keeping of bowling alleys for hire, under its charter power relating to nuisances, and whether the legislature had the right to delegate to a municipal corporation the power to pass by-laws for local objects. In *Mayor* v. *Williams*, 15 N. Y., 502, the only question was whether an ordinance requiring hoistways in stores and other buildings to be enclosed by a railing, and closed by a trap door upon the completion of the business of each day, was a reasonable police regulation.

The condition of the bakery trade in the City of Albany at the time of the enactment of the ordinance and the prosecution of the appellee does not appear either in the statement of facts, nor is it commented

upon in the opinion of the court. No demand for bread of weights substantially different from those fixed by the ordinance, nor any requirements by large consumers to have bread manufactured for them in special sizes under private contract arrangements is shown. It does not appear whether the bakery business as then carried on in Albany was or was not substantially a monopoly. All that appears is that the appellee was caught baking bread deficient in weight for the evident purpose of selling the same as full weight bread.

The *second* case in the *second class* is the case of *In re Nasmith*, 2 Ont., 192.

This is a *Canadian* case. The only point raised and decided in that case was whether a by-law of the City of Toronto requiring the prescribed weight of a loaf of bread to be stamped thereon was reasonable. This appears clearly from the following language of the court:

> "The only part of the by-law moved against is this short section as to the stamping. It appears to me clear that we cannot hold such a provision illegal." (p. 196.)

The ordinance was attacked on no other ground, of course no constitutional question was raised, and while the justice in delivering the opinion of the court by way of argument and illustration refers to the old assize statutes of England enacted as far back as 51 Henry III and 8 Anne, ch. 18, the power of the corporation of the City of Toronto to provide for an assize of bread—that is the fixing of price and weight, or to provide for the selling of loaf

bread in prescribed weights only, *formed no part of the issues in this case.*

We do not attack the provisions of the Chicago ordinance requiring the true weight of each loaf of bread to be labeled or stamped thereon. The issues decided in the Toronto case are entirely different from the issues presented in the case at bar.

The *Third* case in the *second class* is the case of *Commonwealth* v. *McArthur*, 152 Mass., 522.

This was a prosecution under the bread statute of Massachusetts, enacted in 1859. That statute is plainly directed only against the retail sale of bread in shops, and requires that in every such shop

> "where bread is sold by retail, and in each front window thereof, there shall be conspicuously placed a card on which shall be legibly printed a list of the different kinds and qualities of loaves sold there, with the price of each, per loaf, and half, three-quarter and quarter loaf."

It fixes the weight of bread at two pounds, and permits the selling of half, three-quarter and quarter loaves, but it expressly exempts from the operations of the statute, bread composed in chief part of rye or maize. It thus exempts from its operations rye bread, which, as the record in this case shows, is the very bread in large demand in sizes larger than the sizes permitted either under the Massachusetts statute or the Chicago ordinance.

The statute also makes the weighing of the bread in the presence of the buyer a peremptory requirement, and permits the sale of loaves deficient in weight, provided enough bread is added to the loaf to make the total quantity sold at retail correspond

with the weights fixed by the statute. We quote from Section 4 of the Act:

> "Section 4. All bread, except small loaves and fancy bread of less than a quarter of a pound each, sold in any shop or place, shall be weighed in the presence of the buyer and if found deficient in weight, bread shall be added to make up the weight required by law." (Mass. Acts 1859-61, ch. 174, 328.)

The Chicago ordinance if upheld would make it impossible for the baker to dispose of any loaf bread which happens, as such will often unavoidably be the case, to be deficient in weight, as the record establishes beyond dispute that in the ordinary and careful baking of bread short weight loaves are practically unavoidable. The Chicago ordinance virtually confiscates such loaves.

Whether the act conflicts with the State or Federal Constitution was a question not raised or discussed in that case.

The case turned upon the sole point whether bread of a certain quality and weighing more than a quarter of a pound in the loaf came within the provisions of the statute. For all there appears, this statute merely established standard weights in accordance with the customs and usages of the business, and guarded against imposition by requiring a *price list* to be posted in shop windows. As already indicated, the statute is clearly directed against the retail sale of bread only in the small shops of the cities, and has no reference to the sale of bread made to order, as per example, to large consumers under special, private contracts.

The *fourth* case in the *second* class is the case of *People* v. *Wagner*, 86 Mich., 594.

This case upholds the validity of an ordinance (Printed Record, pp. 98-100) passed by the City Council of the City of Detroit in 1870, providing that all bread manufactured by the bakers of that city for sale shall be made into loaves of one pound, two pounds and four pounds, and no other. The differences between the provisions of the Detroit ordinance and the ordinance in question here, and between the state of facts as shown in the decision of that case, and the uncontradicted facts presented by this record, are so radical and important as to justify the following analysis:

The scheme devised by the *Detroit* ordinance consists in this: That the ordinary buyer of loaf bread in the shops shall be informed of the pretended weight of each loaf by the mere appearance of the loaf only, *"a vista."* This is apparent from the *omission* of any provision concerning the labeling or stamping of the loaves and the prescription of three weights only, that is, of the weights of one pound, two pounds and four pounds; the second of the prescribed weights being double that of the first, and the third of the prescribed weights being double that of the second.

The scheme devised by the *Chicago* ordinance is, that the buyer of loaf bread shall be informed of the weight *by the label* placed upon the loaf. This is evidenced by the careful provisions of the Chicago ordinance concerning the size of the labels, the size of the type, the color of the printer's ink and of the

paper to be used. The evidence in this case also demonstrates that loaves of equal size may have essentially different weights in accordance with the quality of the material used, the manner of baking, etc., and that in the City of Chicago loaf bread is not sold in certain definite shapes, but in many different shapes and forms, many of them presenting a radically different appearance from the others.

In the *Detroit* case there was no evidence adduced that, in the ordinary course of business of the bakers there, a regular demand existed for loaves of weights *other* than the weights prescribed in the ordinance. On the contrary, the whole argument of the court is based upon the assumed fact that in *Detroit* bread was INVARIABLY sold in loaves of the prescribed weights. In the course of more than twenty years between the passage of the Detroit ordinance (1870) and the hearing of the case (1891) only *one* baker had been found to make bread of other weights. The court, on page 599, emphasizes this fact by stating:

> "Sales are *invariably* made in loaves of the size of one, two or four pound packages, and the ordinance simply takes the usual and ordinary packages of loaves into which bread is made, and fixes the standard of weight of each package."

In *Chicago*, the uncontradicted evidence in this case proves conclusively that bread in Chicago is NOT *invariably* sold in the weights prescribed by the ordinance; that bread in *substantially* different weights is *usually and commonly* sold in the ordinary course of business, and that loaves of weights so substantially different from the weights pre-

scribed are for important business reasons, and to meet legitimate business exigencies, made and sold in large daily quantities, amounting to many thousands of loaves each day.

The proof in this case shows conclusively that, in the ordinary pursuit of the baker's business in the City of *Chicago*, loaves of the weights prescribed in the Chicago ordinance are the *exception* and not the rule.

In the *Detroit* case the facts were that *there* bread was *invariably sold by weight*. In *Chicago*, the evidence shows that bread *never was at any time sold by weight*.

In view of the provisions of the Detroit ordinance above pointed out, and specially commented upon by that court in its opinion, and in view of the facts expressly pointed out by the court, concerning the weights *invariably* used in the business transactions between the baker and his customers in that city, the court upheld the ordinance as a constitutional exercise by the state, through the municipality of Detroit, under its police power, in protecting the consumers of bread from frauds which may be attempted by the bakers in the matter of the weight of the loaf. The Michigan decision is, therefore, based:

(1) Upon an *ordinance radically different* from the Chicago ordinance.

(2) Upon a *state of facts radically different* from the state of facts established by the uncontradicted evidence in this case.

In the *Detroit* case, the sale of loaf bread in

weights different from the weights prescribed in their ordinance, which led to the institution of that suit, was that of loaf bread *made expressly for the only purpose of violating the ordinance* to enable the city to institute a prosecution, for the purpose of testing the ordinance. Immediately after the prosecutions were instituted, the *baker resumed* his former manner of making bread, in weights *complying with the ordinance,* and which were the weights *invariably* in use by him for many years.

We quote from the opinion of the court in the Wagner case:

> "* * * The evidence shows * * * that but one of these defendants has before this time been complained of, and that was fifteen years ago; and it is admitted by defendants not only that the ordinance may be complied with but that the short weight bread discovered by the inspector was made for the very purpose of testing the validity of this ordinance, and after the authorities had caused complaint to be made against defendants, they resumed the former manner of doing business and made their bread in accordance with the provisions of the ordinance." (p. 598.)

That the court construed the ordinance not to prohibit the sale of loaves weighing *more* than the prescribed weights, is apparent from this language of the court, on page 599:

> "It (the ordinance) *does not prohibit* the sale of bread by weight, *if it overruns,* as it is claimed it sometimes does, nor does it prohibit the exaction of *an increased price by reason of the additional weight.*"

The decision in nowise justifies the ordinance upon

the claim that the business of the baker is *affected with a public interest*, and for that reason alone, subject to state regulation and control.

This exhausts the analysis of the cases cited by the Supreme Court of Illinois. We submit that the provisions of the ordinances or statutes which were upheld in the cases in which the fixing of the weight of loaf bread is held to be within the legitimate exercise of the police power, and the state of extemporaneous facts concerning the trade customs and usages, and the demands of the consuming public, appearing from these decisions are so totally and essentially different from the Chicago ordinance and the facts conclusively established in the record of this case, that these cases cannot be considered to be of controlling effect in deciding the case at bar.

C.

Cases concerning bread laws not cited by the Supreme Court of Illinois.

It behooves us to submit to the attention of this Honorable Court two other bread cases not mentioned or referred to by the Supreme Court of Illinois.

The first is the case of

City of Buffalo v. *Collins Baking Co.*, 39 N. Y. App. Div. Rep., 432.

The decision in this case was rendered by the Appellate Division of the Supreme Court of New York in 1899. It turned upon the validity of an ordinance of the City of Buffalo providing that all

loaf bread baked in that city shall be made into loaves weighing not less than one and one-half pounds. Because it appeared in that case, just as it appears in the record of this case, that there was a legitimate demand for loaves of bread of prohibited sizes, the ordinance was held to be unconstitutional. The opinion of the court delivered by Mr. Justice Spring was concurred in by all the other justices. We quote therefrom as follows:

> "*There is a demand for loaves of bread of one pound weight. The sales of this size made by defendant have averaged about 200 loaves each day. It is, therefore, engaged in a proper business, supplying the needs of the people daily at a confessedly moderate charge and without any criticism as to the quality of the food furnished.* There is no necessity for the common council to prohibit it from carrying on this trade; its endeavor to do so is an unreasonable proscription of a legitimate calling. Enforcement of the ordinance will tend to lessen the value of the property invested in the enterprise, to diminish the number of its employes and to decrease its sales, and with no benefit accruing to the people of the City of Buffalo."

The second case is the case of

State of Kansas v. *McCool*, 83 Kans., 428.

It turned upon the validity of a statute framed apparently very much upon the lines of the Detroit ordinance; the sizes of the loaves were therein prescribed to be of the weights of a half-pound, one pound and two pounds, the second and third size being respectively double that of the one preceding. As the court in the Michigan case deciding in favor

of the Detroit ordinance bases its decision upon the fact that the ordinance merely adopted the weights in which bread was invariably sold in the City of Detroit, so the Kansas decision is based upon the fact that the sizes prescribed conformed to the trade custom prevailing in Kansas. We quote from the opinion (page 430):

> "The size of a loaf is fairly well established by trade custom, and the price is generally a common price per loaf of the popularly understood size."

No labels are required by that statute to be placed upon the bread unless it is deficient in weight, indicating that the sale of bread deficient in weight is permitted provided it is properly labeled. Again, the statute has no application to rye bread, being the kind of bread commonly required in large size loaves in Chicago. Unavoidable variations in size incident to the difficulty in making loaves of the exact weights prescribed, are taken into account, and it is expressly provided in Section 15 of the Statutes of Kansas fixing the weight of bread and weights and measurements of other commodities that:

> "A slight variation from the stated weight, measure or quantity for individual packages is permissible, provided this variation is as often above as below the weight, measure or quantity stated." (Kansas Session Laws 1909, Ch. 264, Sec. 15, page 648.)

And the court also so holds when it says in its decision:

> "Unavoidable variations in size are not taken into account and with these out of consideration the loss to any honest baker from mishaps

resulting in unsalable short weight loaves will be infinitesimal." (p. 431.)

The only precedents cited by the learned justice delivering the opinion of the court are the Detroit case heretofore fully commented upon and the decision of the Supreme Court of Illinois in the case at bar.

The Kansas statute also differs from the Chicago ordinance, in that the Chicago ordinance absolutely prohibits the sale of short weight loaves, even if properly labeled and weighed in the presence of the customer; nor does it permit the making up of the deficiency in weight. In short, not only is that statute in its provisions substantially different from the Chicago ordinance, but the state of facts upon which that statute was framed is different from the facts shown by the record of this case. The Kansas statute as well as the Detroit ordinance adopt the weights established by trade custom; the Chicago ordinance interferes with the established trade customs and with the pursuit of the business of the baker in the ordinary, customary, well established and reasonable manner in which it had been prosecuted for many years. The Kansas statute and the Detroit ordinance may under the circumstances prevailing in Kansas and in the City of Detroit be reasonable regulations conceived for the sole purpose of preventing fraud; the Chicago ordinance is an arbitrary and unnecessary interference with the legitimate and customary pursuit of a purely private business, and its provisions go way beyond such requirements as are necessary for the protection of the public.

D.

Charter power of the City of Chicago.

Much stress has been laid in the argument of the case in the court below that the Chicago ordinance in question in this case was enacted in pursuance of the charter power,

> "To regulate the sale of bread in the city; prescribe the weight and quality of the bread in the loaf"

and that as this ordinance has been enacted in pursuance of an express charter power it rises to the dignity of a statute. We admit that there is in existence a power in the General Incorporation Act under which the City of Chicago is acting, authorizing its city council to prescribe the weight and quality of bread in the loaf, and if the mere power of the city to so prescribe the weight were attacked, it would be tantamount to an attack of a state statute. Our attack is, however, directed not only, and not so much, to the *power* itself, when limited to ordinary retail sales and in the absence of legitimate special contracts to the contrary, but principally to the *manner* in which the power has been exercised by the City of Chicago. Had the city charter authorized the City of Chicago to prescribe the weight of loaf bread in the sizes set forth in the ordinance, then the argument that the ordinance is to be treated the same as a statute would be well taken; but the charter is silent upon the *manner* of the exercise of that power, and therefore the detailed provisions of the ordinance are merely the provisions of a city ordinance, and not

of the same dignity as the provisions of a state statute. The doctrine invoked by us was very happily stated by Chief Justice Lord Russell when he said:

> "In the first place we must see whether the legislature had given authority to make by-laws on the particular subject, and, in the second place, if they have given authority, then we must consider whether that authority has been reasonably exercised in the case of the particular by-law in question." (*Attorney* v. *Farrell*, 18 Cox C. C., 321.)

And Judge Dillon states the doctrine in this manner:

> "Where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a *specified and defined* character, if the power thus delegated be not in conflict with the constitution, an ordinance passed in pursuance thereto cannot be impeached as invalid, because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. But when the power to legislate on a given subject is conferred, *and the mode of its exercise is not prescribed*, then the ordinance passed in pursuance thereof *must be a reasonable exercise of the power*, or it will be held invalid."
>
> 1 *Dillon's Municipal Corporations*, 3rd ed., p. 328.

The doctrine as stated by Judge Dillion has been expressly approved by the Supreme Court of Illinois:

> "And even where the power to legislate on a given subject is conferred on a municipal corporation, yet if the *details* of such legisla-

> tion are not prescribed by the legislature, then the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid."
>
> *Hawes* v. *City*, 158 Ill., 653.

A case "on all fours" on this proposition with the case at bar, is the case of

> *C. & A. R. R. Co.* v. *City of Carlinville*, 200 Ill., 314.

The City of Carlinville was incorporated under the General Incorporation Act, which gave to all cities incorporated thereunder the power

> "*to regulate the speed of * * * cars and locomotives within the limits of the corporation*,"

and Section 24, of the act with regard to fencing and operating railroads, provides:

> "that no such ordinance shall limit the rate of speed in case of passenger trains to less than ten miles per hour, nor in any other case to less than six miles per hour,"

and yet the court held: that, subject to the limitation contained in Section 24 of the act with regard to fencing and operating railroads, the charter power

> "to regulate the speed of * * * cars and locomotives within the limits of the corporation"

was *no protection in case such regulation was unreasonable*.

To the same effect is

> *Wice* v. *C. & N. W. R. R.*, 193 Ill., 351, 356.

In all such cases the question remains to be considered whether the municipal authorities have reasonably exercised the power vested in them.

> *Chicago* v. *Gunning System*, 214 Ill., 628.

E.

The real purpose of the ordinance is arbitrarily to influence the price of bread.

While apparently the purpose of this ordinance is to regulate the weight of loaf bread for the protection of the buyer against imposition in the matter of short weight loaves, we maintain that the undisputed evidence contained in the record of this case demonstrates that the real, although hidden, purpose of this ordinance is to affect the prices of loaf bread and (except under very extraordinary conditions) to compel the sale of a one pound loaf of bread for five cents, irrespective of the price of the raw material and other elements of expense entering into the cost thereof to the baker.

Long established customs and usages of trade are not to be slightly regarded, and when, through a long continued course of dealing, they have become a matter of almost universal practice, they cannot at once be brushed off by new legislative experiments, and, as a rule, will, for a long time, survive any attempts at interference by legislation. Such customs and usages are the natural and inevitable outgrowth of actual conditions, in which they are deeply rooted, and a substantial change therein, based merely upon arbitrary legislation having no regard for those conditions, will usually be resisted up to the very point of the nullification of the very object of such new and arbitrary legislation. The smallest monetary unit in the United States is one cent, and that smallest unit is five times as large as the smallest monetary units of France and Italy (one centime and one centesimo)

and more than four times as large as the smallest monetary unit of Germany (one pfennig). The record in this case discloses the fact that by the long established usages and customs prevailing in the bakery business in Chicago, ninety-five per cent. of the loaf bread going to the private consumer is *not* sold by weight, but *irrespective* of the weight thereof, in loaves costing five cents, ten cents, fifteen cents, and other multiples of five cents. If there is such a thing as a standard loaf of bread in the City of Chicago, it is not the one pound loaf, but the five cent loaf, and the evidence establishes beyond the peradventure of a doubt that the difference in the quality of the bread, as well as the constant and sometimes enormous fluctuations in the price of flour or grain, are adjusted by the difference in the weight of the loaves selling at five cents and multiples thereof.

It is in evidence, and uncontradicted, that if good loaf bread would have had to be sold to the consumer at the price of five cents per pound, at the time of the trial of this case, the loss to the baker would have been thirty-four cents per one hundred loaves. (Printed Record, p. 30.)

The table printed in the appendix to this brief showing the prices of the various grades of flour sold in the City of Chicago in 1907 (the year preceding the passage of this ordinance), and the fluctuations in those prices, show conclusively that unless the long established customs and usages of the bakery trade in its relation to the private consumer be radically changed, a mere arbitrary restriction in the weights of the loaf bread permitted to be sold is

without any reasonable foundation whatever. Should such an arbitrary measure prevail, then one of three things would happen: Either that fluctuation in the price of flour and the other ingredients of the various kinds and qualities of bread affected by the ordinance must lead to an increase or reduction in price of fully twenty per cent. of a very large part of the loaf bread sold in Chicago, though the fluctuation would only justify an increase or decrease—as the case may be—of say, five, ten or fifteen per cent.; or, the effect of the fluctuations will be harmonized with the established prices of bread by the use from time to time of better or poorer raw material; or, the price of bread being fixed by custom, profit or loss of the baker dependent on that price are entirely at the mercy of municipal legislation. The experience of the bakers of Detroit, which is in evidence in this case (Printed Record, p. 100) shows that an increase of one cent per loaf completely demoralized the bakery business there, and brought about a decrease in the daily output of one bakery of not less than seven thousand loaves. It must be plain, therefore, that whenever the fluctuations in the cost of the raw material and the other elements entering into the cost of a loaf of bread are large enough to deprive the baker of his legitimate profits, provided the price of the one pound loaf is maintained at five cents, he will, in self-defense, so lower the quality of the bread as to equalize in that way the effect of the fluctuations, rather than to submit to such a drastic reduction of his output as would be the inevitable result of an increase of the price of loaf bread from five to six cents. As the mere weight of a loaf of

bread is a very inefficient and unreliable index of its real value in relation to quality and to the nutriment it contains, an arbitrary limitation upon the different weights permitted to be sold by the bakers is a device utterly worthless in the matter of the protection of the consumer and particularly so when the true weight of each loaf is indicated by way of labeling or stamping. Bread legislation, to be reasonable and to afford protection to the consumer must be on the lines of the old assize bread ordinances, which were based upon the *three* factors of quality, weight and price in their logical relation to each other. But to arbitrarily fix the weight of the loaves alone, and to prescribe as to the quality that nothing but wholesome flour and meal shall be used in the manufacture of bread, and that the bread shall contain no deleterious substances, simply means this: That, in view of the established custom regarding the price of bread in the city, being five cents per loaf, or multiples thereof, quality will be sacrificed to maintain the price, or the price will often be advanced way beyond reason. The experience of England, with its assize laws, covering hundreds of years, speaks volumes on that subject, and when the committee of the House of Commons, recommending the repeal of the assize laws, on June, 1815, reported that

> "they are distinctly of the opinion that more benefit is likely to result from the effects of a free competition in the trade, than can be expected to result from any legislation or restrictions under which the trade could possibly be placed,"

they truly prophesied the result of the development

of the bakery business in the eight decades since elapsed.

One thing is certain, that if this ordinance could be enforced, it would still leave the *quality* of the bread to competition,—the most difficult thing for the consumer to determine. What possible objection can there be to also leave the *quantity* of bread to be a subject-matter of competition, as long as the bakery business is exposed to the fiercest competition and as long as the rights of the public can be safeguarded in the matter of quantity by reasonable regulations in the matter of stamping or labelling of bread as to its weight?

Is not an ordinance, which, because of the natural and unavoidable effect of an established custom or trade usage, will inevitably lead to the deception of the public in the matter of the most important element affecting the article of bread, *i. e.*, the matter of *quality*, on the pretense of protecting the public in the matter of a comparatively less important element—*i. e.*, the matter of *quantity*, a most arbitrary, unreasonable and utterly unnecessary piece of municipal legislation tending merely to fix price and quantity irrespective of all other considerations, and necessarily, in the case of unfavorable fluctuations in the market price of the raw material, *at the expense of quality?*

F.

In Conclusion.

The Chicago Ordinance is a sample of drastic municipal legislation. It is so designated by the Supreme Court of Illinois when in the concluding paragraph of its opinion we find this language:

> "While its provisions may be *drastic*, we do not think the ordinance is unconstitutional." (Printed Record, 113.)

We urge that it is so drastic that it is unconstitutional. Under the guise of the exercise of the police power to prevent fraud it attempts to perpetuate one of the elements of the ancient regulations imposed upon the business of the baker, that is, the prescription of the weight, but disconnecting it from the fixing of price and of quality, of which the prescription of the weight was but an incident. Under that guise it really aims to affect the price regardless of the fluctuations in the cost of production. It unnecessarily interferes with the ordinary, customary and honest pursuit of the business of the baker as conducted in the City of Chicago for many years. It denies to the baker the right to supply the ordinary and legitimate wants of the consumer. It unnecessarily deprives him of the right freely to contract in relation thereto. It is an arbitrary piece of municipal interference with a private and useful calling, extravagant in its requirements and unnecessary in its limitations. There must be a boundary line beyond which city councils cannot transgress in interfering with ordinary and useful callings

under the pretense of the exercise of the police power. That boundary line must be ascertained from the facts in each instance. The facts in this case establish clearly that this boundary line has been violently overstepped by the city council of Chicago.

The plaintiff in error, we urge, is entitled under the facts of this case, to that protection which is vouchsafed to him by the Fourteenth Amendment of the Federal Constitution, and that in order to accord him that protection, the ordinance should be held to be unconstitutional and the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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BENJAMIN F. NINDE,
Counsel for Plaintiff in Error.

APPENDIX.

The New Orleans Bread Ordinance Passed on in Guillotte v. City, 12 La. Ann., 432.

An ordinance for establishing the assize and regulating the weight and inspection of bread.

"Art. 73. (Section 1.) *Be it Ordained,* That all bakers or other persons now engaged in, or doing and carrying on business as bakers, or engaged in making or baking bread for others, shall immediately, after the promulgation of this ordinance, report themselves at the mayor's office, and cause his, her or their name or names and place of business to be recorded in a book to be kept for that purpose in the mayor's office, and shall in all respects conform to the provisions of this ordinance; and hereafter, every person intending to undertake the bakery business, or any such person or persons who may be engaged in the same, either in person or by employing any other person to carry on the said trade or business under his or her directions, or for his or her profit, within the limits of the city of New Orleans, must, previously to his or her commencing in that business, make a declaration of his or her intention at the mayor's office, and have his or her name entered in a book kept for that purpose; and in default, shall be liable to a fine of twenty-five dollars, recoverable before any of the recorders of this city, or other court of competent jurisdiction, for the benefit of the city.

Art. 74. (Section 2.) All bakers or other persons

using or carrying on the trade or business of a baker shall make, or cause to be made, all their loaf bread of good and wholesome flour, no brand to be used less than treble extra, and they shall give it the weight, which may be fixed by virtue of the present ordinance, or any other ordinance hereafter passed relative thereto by the common council; and further, all bakers and persons using or carrying on the trade or business of a baker, shall only be allowed to sell, or expose for sale, loaves of bread of the value of five cents, ten cents and twenty cents; provided, all loaves of bread shall have the weight fixed by said tariff.

Art. 75. (Section 3.) Bakers, tavern-keepers and other persons selling bread, or offering the same for sale, are required to have the weights and scales only regulated by the standards; and the inspector of weights and measures are authorized to proceed to try them agreeably to the law respecting weights and measures.

Art. 76. (Section 4.) It shall be the duty of the commissaries of the markets, and the deputy street commissioners, at least once in each week, to inspect and examine, within the several wards or districts of this city and the public markets, all loaf bread baked by, or for or on account of any baker or bakers, in order to ascertain whether the same is made of good and wholesome flour, and to ascertain whether the weight conforms to the established assize; and to that end said commissioners and deputy street commissioners are hereby authorized and required, at any time between sunrise and sunset, to enter any bak-

ery, bakehouse or shop, storehouse or other building or enclosure wherein loaf bread is or may be baked, stored, deposited or kept, as also any tavern, shop, store, or any other place wherein loaf bread is deposited, stored or kept for sale; provided the authority of the officer thus about inspecting be first made known to the proprietor of the establishment, or his agent or representative. And it shall further be the duty of the commissaries of the markets and the deputy street commissioners, for the purposes of said inspections through the public streets or highways, to stop all persons carrying bread for sale in baskets, carts, wagons, or otherwise, upon said streets or highways, and examine and weigh such bread; and upon said examination, should they find such bread, on an average of ten loaves to the hundred, to be unwholesome or wanting in weight, the officer making such examination under this ordinance, shall seize the bread, and immediately notify the proprietor of the bakery, bakeshop, etc., to appear before one of the recorders of this city, who, upon due proof made, shall pronounce the seizure and confiscation of such bread for the use of the orphan asylums of this city, and shall further condemn the offender or offenders, to pay a fine of not less than twenty-five dollars nor more than fifty dollars; and in default of payment thereof, such offender or offenders shall be imprisoned not exceeding thirty days. Any commissary or deputy street commissioner neglecting or refusing to enforce the foregoing shall be dismissed from office.

Art. 77. (Section 5.) The mayor shall publish in the official journal of the city, every Saturday, an

assize for bread for the ensuing week. To this effect he shall estimate a barrel of flour to produce three thousand seven hundred and thirty-two ounces of bread, (American weight); and in order to ascertain the weight of a five-cent loaf, the number of ounces shall be divided by a number equal to the number of five cents a barrel of flour may be worth in the market at the time of fixing the assize, and adding the eight dollars, or one hundred and sixty-five cents, allowed to a baker by law, the quotient shall be the number of ounces a five-cent loaf shall weigh.

Art. 78. (Section 6.) Wherever, according to the preceding operation, the fractional parts are less than half an ounce, they shall be taken off the loaf; and when half an ounce or more, an ounce shall be added to it. The whole, moreover, in conformity to the tariff subjoined to the foregoing ordinance:

TARIFF.

Price of Flour per bbl.	20c Loaves.	10c Loaves.	5c Loaves.
$ 4.00	62 oz.	31 oz.	16 oz.
5.00	57 "	29 "	14 "
6.00	53 "	27 "	13 "
7.00	50 "	25 "	12 "
8.00	47 "	23 "	12 "
9.00	44 "	22 "	11 "
10.00	41 "	21 "	10 "
11.00	39 "	20 "	10 "
12.00	37 "	19 "	9 "
13.00	35 "	18 "	9 "
14.00	34 "	17 "	8 "
15.00	32 "	16 "	8 "
16.00	31 "	16 "	8 "

Art. 79. (Section 7.) Any baker or other person carrying on the business of baker, or engaged in making and baking bread, as aforesaid, who shall mix, or use, or permit to be mixed or used, in the manufacture of bread, any alum, vitriol, or any other unwholesome deleterious substance, shall, on conviction before any of the recorders of this city, or any other competent court, be fined in a sum not exceeding one hundred dollars; and in default of payment of such fine, shall be imprisoned not exceeding thirty days.

Art. 80. (Section 8.) *Bread to order shall not come within the provisions of this ordinance.*

Art. 81. (Section 9.) All ordinances and resolutions conflicting with the foregoing be, and the same are hereby repealed.

Art. 82. That from and after the passage of this ordinance, each and every person or persons dealing in bakers' bread shall post, in a conspicuous place at his or her place of business, the weights and prices of the loaves offered for sale; and any violation of this ordinance shall be punishable by a fine of fifty dollars for each and every offense, recoverable before any court of competent jurisdiction.

Art. 83. (Section 2.) All ordinances, or parts of ordinances contrary to or conflicting with the above, be, and the same are hereby repealed."

Summary of Bread Legislation in England, Germany and France.

In ancient times and during the Middle Ages the power of government over the affairs of men was practically unrestricted. From the earliest days of organized society down to comparatively recent years, a paternalistic system of state interference with various vocations prevailed in Europe; but this paternalistic tendency weakened steadily with the progress of civilization, until to-day (at least in this country and in England) its sphere of action is almost entirely confined to those callings and enterprises which are either based upon some privilege or franchise, or as a matter of fact are *public* or *quasi-public* in their character.

The history of the legislation affecting the sale of BREAD discloses this significant fact: That the *weight* of the bread was always fixed *in connection with the price and the quality;* in other words, neither at any time in Europe nor, until a very late day, in the United States, was bread legislation directed to regulate the weight without at the same time regulating, in connection therewith, the price and the quality.

In **England** the first bread legislation seems to have been An ORDINANCE OF ASSIZE, made in the reign of King John, the purpose of which appears to have been to regulate the charges and profits of bakers.

The statute called ASSISA PANIS ET CERVISIAE enacted in the 51st year of Henry III (A. D. 1266) was (at the petition of the bakers of Coventry) an exemplification of these ordinances of assize made in the

reign of King John. After the specification of the TABLE of ASSIZE in the act, it was stated:

> "that then a baker in every quarter of wheat (as it is proved by the King's bakers) may gain four pence and the bran, and two loaves for advantage; for three servants three halfpenny, for two kneading one halfpenny, for candle one farthing, for wood twopence, for his bultel (or bolting) three halfpence, in all sixpence three farthings, and two loaves for advantage."

It is significant that in this early bread act, as well as in all English bread legislation up to the time of the repeal of all acts providing for an assize of bread, due regard was always had to the relation which price, weight and cost of raw material bore to each other, so the statute of 51st of Henry III provided that

> "when wheat shall sell at twelve pence the quarter, the farthing loaf shall weigh 10 L. 11 S. 6 D. which weight (as was usual in those times) being expressed in pounds, shillings and pence."

When the Troy weight was established in the 18th of Henry VIII, the tables of assize were duly adjusted and subsequently, in the thirteenth of Charles I, when the avoirdupois weight was introduced, the tables were again adjusted according to the principle that 73 ounces Troy equal 80 ounces avoirdupois. The table of assize made provision for eight different sorts of bread, and the statute provided for frequent readjustment of price and weight to the cost of raw material.

In the latter part of the reign of Queen Elizabeth, a BOOK OF ASSIZE was published by Order of Council, which refers to a former Book of Assize, and it appears that

"Anno. 1405, 12 Henry VII, when the best wheat was sold at 7 s. the second at 6s. 6d. and the third at 6 s. the quarter,

The Baker was allowed,

	s.	d.
Furnace and wood	0	6
The Miller	0	4
Two journeymen and two apprentices	0	5
Salt, yeast, candle and sack bands	0	2
Himself, his house, his wife, his dog, and his cat	0	7
In all	2	0

And the Branne to his advantage."

It is also significant that under these various assizes, the policy of the law was not merely to fix the weight of bread, but also the price with regard to the cost of raw material, *and* what, in the opinion of the authorities, would be a proper *profit* to be allowed to the baker. The money allowance appears by its specified application in the statutes to have been for the purpose only of repaying the baker's charges for grinding and baking, while he was allowed "advantage loaves" for his maintenance and profit.

By the statutes of 8th of Anne, it was directed

> "that the magistrates in setting the assize of bread, are to have respect to the price, the grain, meal or flour whereof said grade shall be made, shall bear in the several public markets."

Similar provisions are found in the 31st of George II and later statutes.

By the act of the 37th George II, and the subsequent acts by which that act has been explained and amended, the operation of those acts was limited to the City of London and the territory within ten miles of the Royal Exchange.

By the act of 31st George II it was left to the discretion of the magistrates to fix the price of bread, either by the price of wheat or by the price of flour, as they may see fit. This was an innovation from the ancient Assize system, as from the year 1202 to 1709 the price and weight of bread depended solely on the price of wheat, and the allowance to the bakers always included the charges for grinding and bolting, while, under the statute of 37th George II, the Assize magistrates could fix the price and weight of bread either in accordance with the fluctuations in the price of wheat or in the price of flour.

The following table exhibits the assize price of bread in London in 1814:

Price of flour in shillings.	Price of quartern loaf.		Price of 8-lb. loaf.		Price of 4-lb. loaf.		Price of 2-lb. loaf.		Price of 1-lb. loaf.	
	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
30	0	6½	1	0	0	6	0	3	0	1½
35	0	7½	1	1½	0	6½	0	3½	0	1½
40	0	8	1	2½	0	7½	0	3½	0	1½
45	0	8½	1	4	0	8	0	4	0	2
50	0	9½	1	5½	0	8½	0	4½	0	2½
60	0	11	1	8½	0	10½	0	5	0	2½
70	1	0½	1	11	0	11½	0	5½	0	3
80	1	2	2	1½	1	1	0	6½	0	3½
90	1	3½	2	4½	1	2½	0	7½	0	3½
100	1	5	2	7½	1	3½	0	7½	0	4

(Encyclopedia Brittanica, Vol. III, p. 250.)

After an experiment covering a period of almost six hundred years, this governmental interference with the vocation of the baker in England proved so unsatisfactory and so ill adapted to the modern system of civilization, that in 1815 the House of Commons seriously concerned itself with an investigation of the whole question, and appointed a committee

"to inquire into the state of the existing laws

> which regulate the manufacture and sale of bread, and whether it is expedient to continue the Assize thereon, under any and what regulations, and to report the matter thereof as it should appear to them, to the house, together with their observations and opinions thereon."

On June 6, 1815, the committee presented its report, which, after a careful review of the entire history of bread legislation in England, reported that

> "they are distinctly of the opinion that more benefit is likely to result from the effects of a free competition in the trade, than can be expected to result from any resolutions or restrictions under which the trade could possibly be placed,"

and concludes its report with the following resolution:

> "Resolved, that it is the opinion of this committee that it is expedient that the bread assize laws for the City of London, and within ten miles of the Royal Exchange, shall be forthwith repealed."
>
> *VI Pamphleteer*, 148.

In 1822 these assize laws, as far as they affected the City of London, and within ten miles of the Royal Exchange, were repealed by the 3 George 4 c. 106, and in 1836, by the bread act of 6 & 7 Will. 4 c. 37, the bread assize laws were also repealed, as far as their operation in the entire kingdom was concerned. In their stead statutes were enacted which were merely in the nature of reasonable police regulations in the matter of the adulteration of bread and provided for the weighing of the same.

It is more than significant that, after an experience of hundreds of years in the matter of regulating the weight of bread, the act of 3 George 4, as well as the act of 6 & 7 Will. 4 (the English bread laws now in force), grant to the bakers unlimited freedom of contract and leave the size and weight of the loaves to be determined alone by the exigencies of their business and the requirements of the consumers.

We desire to refer particularly to the following section found in each of those statutes:

> "3. It shall and may be lawful for the several makers or sellers of bread beyond the limits aforesaid to make and sell, or offer for sale, in his, her or their shop, or to deliver to his, her or their customer or customers, bread made of such weight or size as such bakers or sellers of bread shall think fit; any law or usage to the contrary notwithstanding."

The only restrictions in the matter of weight are that bread shall be sold by weight only, whether sold in the shops or delivered from any cart or other carriage.

It is also important that the provisions of the present English bread act apply only to common or staple bread, both acts containing the following proviso:

> "Provided, always, that nothing in this act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread, or rolls, without previously weighing the same."

Later, by 52 & 53 Vict. c. 21, the provisions in the acts requiring bread to be weighed in the presence

of the purchaser were restricted to sales of bread made in the bake shops.

In **Germany**, the assize of bread (Brottaxe) was maintained until the last remnants of the mediaeval restrictions upon the exercise of the various trades and callings were cleared away by the enactment in 1869 of the "Gewerbe-Ordnung." This law removed all the shackles with which the trades were fettered, and substituted therefor reasonable police regulations. In the matter of the sale of bread, this law provides:

> "Section 73. The bakers and sellers of bread may be required by the local police authorities, during certain times, to be fixed by these authorities, to inform the public of the prices and weights of their various goods, by placards affixed to their shops so that they can be seen from the outside."
>
> "Section 74. Where the local police authorities restrict the sale of bread by bakers and sellers to be made only in accordance with the prices placarded in their shops, the authorities shall also have the right to require that scales and sealed weights be maintained in the shop, so as to permit the weighing of the goods sold."
>
> Gewerbe-Ordnung Fuer Das Deutsche Reich, August 6, 1896.

In the cities of **France** the business of the baker was particularly a subject of state supervision, but all the laws and regulations were swept away by the revolution of 1781, which proclaimed absolute freedom of trade. Under the reign of Napoleon I this system of complete freedom was again discarded by his "Arrette" of October 11, 1811, and the permis-

sion to carry on the business of a baker was made dependent upon four principal conditions:

(1) The existence of a demand in the particular locality for a bake shop.

(2) The personal efficiency of the applicant for the license, and his good character.

(3) The requirement that the baker must always have on hand a sufficient amount of flour for his demand for the period of fifteen days, about one-half of which had to be stored in a municipal warehouse, and the remainder in the shop.

(4) The obligation not to quit the business or to reduce it or to move it to another part of the city, except upon six months' notice to the authorities.

By later decrees the number of bake shops was limited to one for every eighteen hundred inhabitants of Paris. The flour reserves were increased from one hundred and thirty-five to five hundred and forty bags for each baker, in accordance with his output, with a view that each baker should constantly have enough flour in storage for an output of three months. Up to a definite maximum limit, price and weight of bread were fixed from time to time, in accordance with the market price of flour, and after 1823 price and weight were adjusted every two weeks. The most important feature, however, of French bread legislation as affecting Paris was the creation of a "CAISSE DE LA BOULANGERIE," the object of which was to prevent the price of bread at any time from exceeding fifty centimes per one thousand grammes, and into which fund the bakers were required to make contributions at times, when, owing

to the low price of flour, their profits were large, and out of which they were reimbursed for their losses in case flour reached an inordinately high price. The condition continued to exist until 1863, when the scheme was entirely discarded and superseded by some few simple police regulations.

Revue des Deux Mondes, Vol. 4, p. 964; *ibid,* Vol. 5, p. 400.

It is also significant that the French bread laws expressly exempted from their operation "PAIN DE LUXE," which seems to be the French name for what the English statutes, and what we call "French" "fancy bread."

Summary of Bread legislation in the United States up to the time of this prosecution.

In the **United States**, the laws, customs and usages of the parent countries (England and Holland) were introduced in Colonial times. In the matter of fixing the weight of bread the sensible principle of adjusting weight to price was followed.

On November 8, 1694, the Director General and Council of NEW NETHERLANDS passed an ordinance that the bakers who henceforth make a business of baking bread for sale shall manufacture it either of pure white or pure rye, as these come from the mill, in loaves of eight, four and two pounds weight, *at such prices as shall be fixed by their Honors, the Court, from time to time, according to the value and rate of purchase of the grain.*

On June 5, 1651, the Director General and Council passed another ordinance ordaining that for the ac-

commodation of the poor as well as the rich the baker shall bake rye bread as well as white and wheaten bread, under pain of being excluded from that business and fined twenty-five gilders for the first time he shall be found violating the ordinance.

On October 26, 1656, the Director General and Council, passed another ordinance requiring bakers baking bread, whether for Christian or barbarian, to bake at least once or twice a week, both coarse and white bread, of stated weights and prices.

On April 9, 1658, we find an ordinance providing:

> "Bakers shall bake the white bread and coarse bread, according to the weight and sell it at a price established or hereafter to be established, according to the dearness of the grain."

The first bread ordinance of the CITY OF NEW YORK after the establishment of the Union seems to be the ordinance for

> "establishing the assize and regulating the sale of bread"

passed March 2, 1812. It is a regular assize ordinance, requiring loaf bread to be marked with the initial letters of the maker, to be made of wholesome flour or meal, *in accordance with the regular assize from time to time, the specified weights to govern only during the first eight hours after the bread has been baked,* and making allowance for shrinkage after the expiration of eight hours. It also requires the chamberlain to publish every Saturday an assize of bread for the ensuing week, and prescribes the following:

"Form of assize to be published.

	Shilling loaf.	6d loaf.
Superfine wheat flour,	Oz.	Oz.
Do. mixed with Indian meal,	Oz.	Oz.
Do. mixed with Rye meal,	Oz.	Oz.
Rye flour,	Oz.	Oz."

Although we made diligent search, we are unable to state definitely how long this old assize bread ordinance of the City of New York remained in force, but it certainly ceased to be operative in 1857, when it was replaced by the following bread ordinance:

> "Sec. 1. All bread baked and offered or exposed for sale in the City of New York, shall be made of good wholesome flour and meal, and sold by avoirdupois weight.
>
> Sec. 2. If any baker, or other person, shall make for sale, offer, or procure to be sold, any bread of other than wholesome flour or meal, or shall sell the same contrary to the preceding section, such person shall forfeit and pay the sum of ten dollars for every such offense.
>
> Sec. 3. All bread offered for sale in this city, not in conformity with the provisions of this chapter, shall be forfeited and shall and may be seized and disposed of for the use of said city."

This ordinance is the same as the one that we find in the last compilation of ordinances the City of New York published on January 1, 1905, and, apparently, has not been expressly repealed. It is to be noted that under its provisions a New York baker may adjust the weight of his goods to the prevailing standard prices of five, ten and fifteen cents, etc., and the only restriction as to weight is that the bread must be sold by weight. In view of the provisions of the New York constitution as expounded by

its court of last resort, even that restriction is of doubtful validity, and the last section of the ordinance, concerning the seizure and forfeiture of bread for the use of the city, is clearly invalid. We have reliable information that the ordinance is a dead letter.

The Massachusetts bread ordinance passed in Colonial times, are all assize ordinances, such as the ordinances of 1652, 1698, and 1720. The principal features of all these ordinances are substantially that

> "the selectmen of each town within the province where bread is baked for sale, shall once every month and oftener if they see cause, set to ascertain and appoint within their several towns, the assize and weight of all sorts of bread to be sold, or exposed for sale, by any baker or other person whatsoever, having respect to the price of the grain, meal or flour, wherever such bread shall be made, shall bear in or about the town or place where such assize shall be set, and making reasonable allowances to the bakers for their charges, pains and livelihood, and shall make known their set regulation of the assize of bread in some open and public place or places in their respective towns."

In 1859 the legislature passed a bread law of five sections. The first provides for loaves two pounds in weight. It also provides for half, three-quarters and quarter loaves, but not otherwise. The second section provides for a list to be placed in the window of a bakery, showing the kinds and qualities of loaves sold there, and the price of each. The third section provides for the weighing of the bread in the presence of the buyer. The fourth section provides for a fine. The fifth section excepts from the purview of the law rolls or fancy bread weighing less

than one-quarter ofa pound. This act of 1859, in practically its original form, remains in force in the state of Massachusetts today.

The bread ordinance of the City of NEW ORLEANS is an old fashioned assize ordinance. It was passed in the early part of the last century, amended in 1869, but has not been enforced for more than twenty years. Aside from the assize features the provisions exempting *"bread made to order"* are extremely significant. Like most assize bread ordinances, the price of loaves (in this instance, five, ten, fifteen and twenty cents) is taken as the standard, and the weight adjusted to the price, in accordance with the fluctuations in the cost of flour.

The constitution of the state of Louisiana in force at the time of the passage of this ordinance, contained *no* provisions such as the provisions of Sections 1 and 2 of Article 2 of the Constitution of Illinois, or of the Fourteenth amendment of the Constitution of the United States.

The bread ordinance of the city of MOBILE, Alabama, enacted January 21, 1826, is also an old style assize bread ordinance, and has long since been repealed. At the present time *Mobile has no bread legislation whatever.*

The city of SAN FRANCISCO never had and does not now have a bread ordinance, neither has the state of CALIFORNIA ever passed any legislation in regard to the manufacture and sale of bread.

The colonial assize bread laws of PENNSYLVANIA remained in force until 1797, when a statute was passed requiring all loaf bread to be sold by avoirdu-

pois weight. This statute which, among other things, provides for a penalty of "five pounds" seems never to have been repealed. Its constitutionality has never been tested, and our information is that it has practically been a dead letter upon the statute books, although contracts made in violation thereof have been declared to be void, the statute expressly containing a provision that all contracts for the sale of loaf bread not based upon avoirdupois weight shall be void.

None of the principal cities of Pennsylvania has a bread ordinance.

The only bread ordinance we have been able to find ever to have been in force in CINCINNATI, is the ordinance of June 4, 1900, which contains the following provisions:

> "It shall be unlawful for any person to offer or expose for sale any bread unless the same is made of good, wholesome flour or meal, or both, and all bread offered or exposed for sale shall have the weight of the same stamped upon each loaf."

The ordinance contains no provisions restricting the baker from making loaves of any size or weight.

The city of COLUMBUS has no bread ordinance, nor has the city of TOLEDO.

The city of ST. PAUL has no bread ordinance.

The city of MINNEAPOLIS in 1891 passed an ordinance requiring loaf bread to be made into loaves weighing not less than one and two pounds, respectively, with a proviso, however, *that any baker may sell loaves of bread of any desired shape or weight, if plainly marked with the true weight of each loaf.*

The city of ST. LOUIS has no ordinance prescribing the weight of loaf bread, and the only bread ordinances in force are such as pertain to sanitary measures.

The city of MILWAUKEE has no bread ordinance.

The city of BUFFALO passed an ordinance fixing the weight of loaf bread at one and one-half pounds, but this ordinance was declared to be unconstitutional in

City of Buffalo v. *Collins Baking Co.*, 39 N. Y. App. Div., 432.

and no additional legislation on the subject of the weight of bread has since been passed.

The cities of *Indianapolis, Louisville, Portland, Providence, Grand Rapids and Jersey City* have no municipal legislation concerning the weight of loaf bread.

The result of our most careful inquiries may be summarized as follows:

According to the best information obtainable by us, at the time of the trial of this case the following cities of over 50,000 inhabitants (in 1900) had no ordinances requiring bakers to sell loaf bread in definite sizes only:

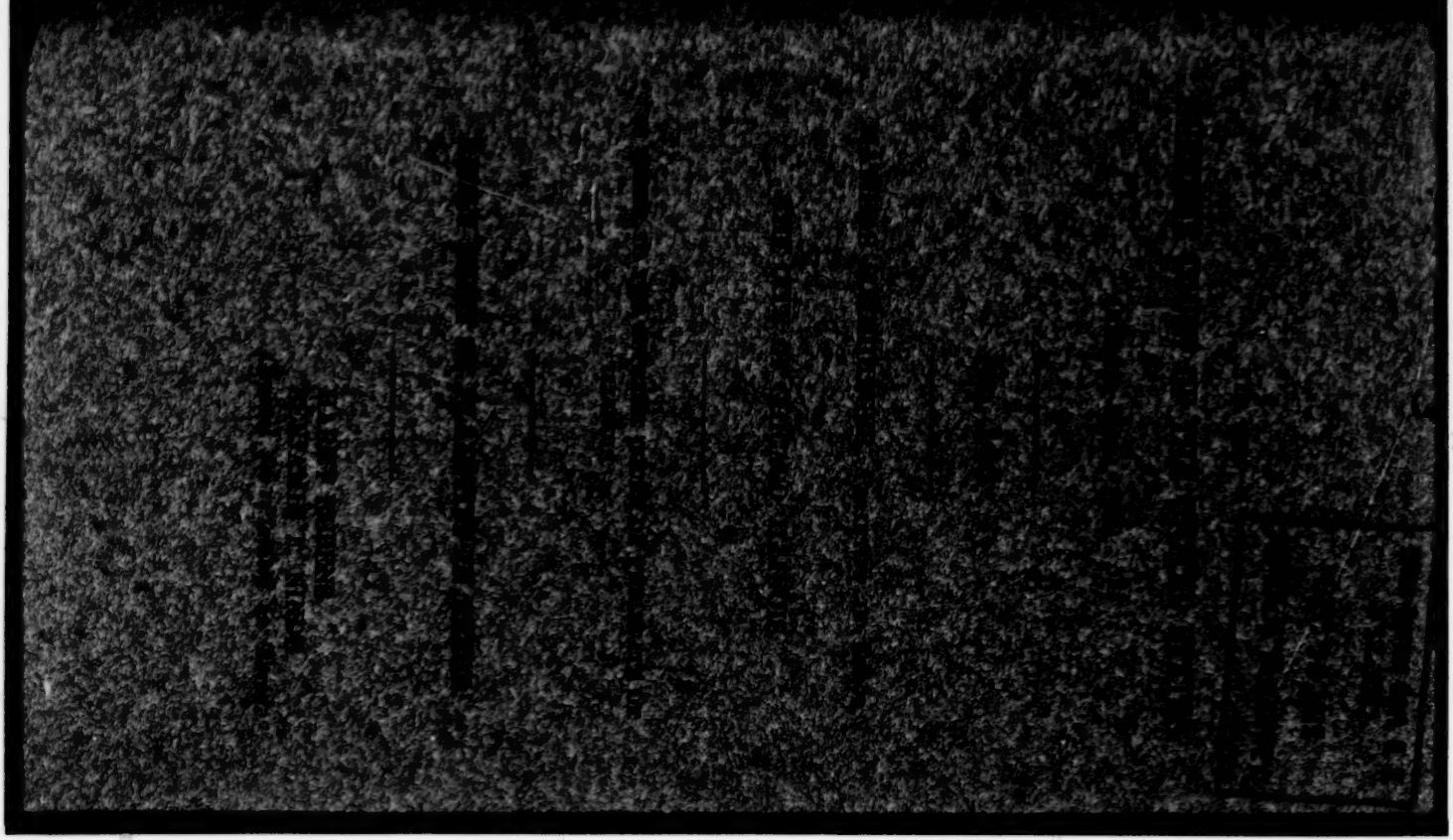
Name	Population	Name	Population
New York	3,437,302	Albany	94,151
Philadelphia	1,293,697	Cambridge	91,886
St. Louis	575,238	Portland, Ore	90,426
Boston	560,892	Atlanta	89,872
Baltimore	508,957	Grand Rapids	87,565
Cleveland	381,768	Dayton	85,333
Buffalo	352,387	Richmond	85,050
San Francisco	342,782	Nashville	80,865
Cincinnati	325,902	Seattle	80,671
Pittsburg	321,616	Camden	79,935
Milwaukee	285,315	Hartford	79,850
Newark	246,070	Reading	78,951
Jersey City	206,433	Wilmington	76,508
Louisville	204,731	Trenton	73,307
Minneapolis	202,718	Bridgeport	70,996
Indianapolis	169,164	Oakland	66,960
Providence	175,597	Lynn	65,513
Kansas City	163,752	Lawrence, Mass	62,959
St. Paul	163,065	New Bedford	62,442
Rochester	162,608	Springfield, Mass	62,059
Toledo	131,822	Summerville	61,643
Allegheny	129,896	Hoboken	59,254
Columbus	125,560	Evansville, Ind	59,007
Worcester	118,421	Manchester, N. H	56,987
Syracuse	108,374	Utica, N. Y	56,383
New Haven	108,027	Savannah	54,244
Fall River, Mass	104,863	Salt Lake City, Utah	53,531
St. Joseph, Mo	102,979	San Antonio	53,321
Omaha	102,555	Duluth	52,969
Scranton, Pa	102,026	Des Moines	52,139
Paterson, N. J	101,171	Elizabeth, N. J	52,130
Lowell	94,969		

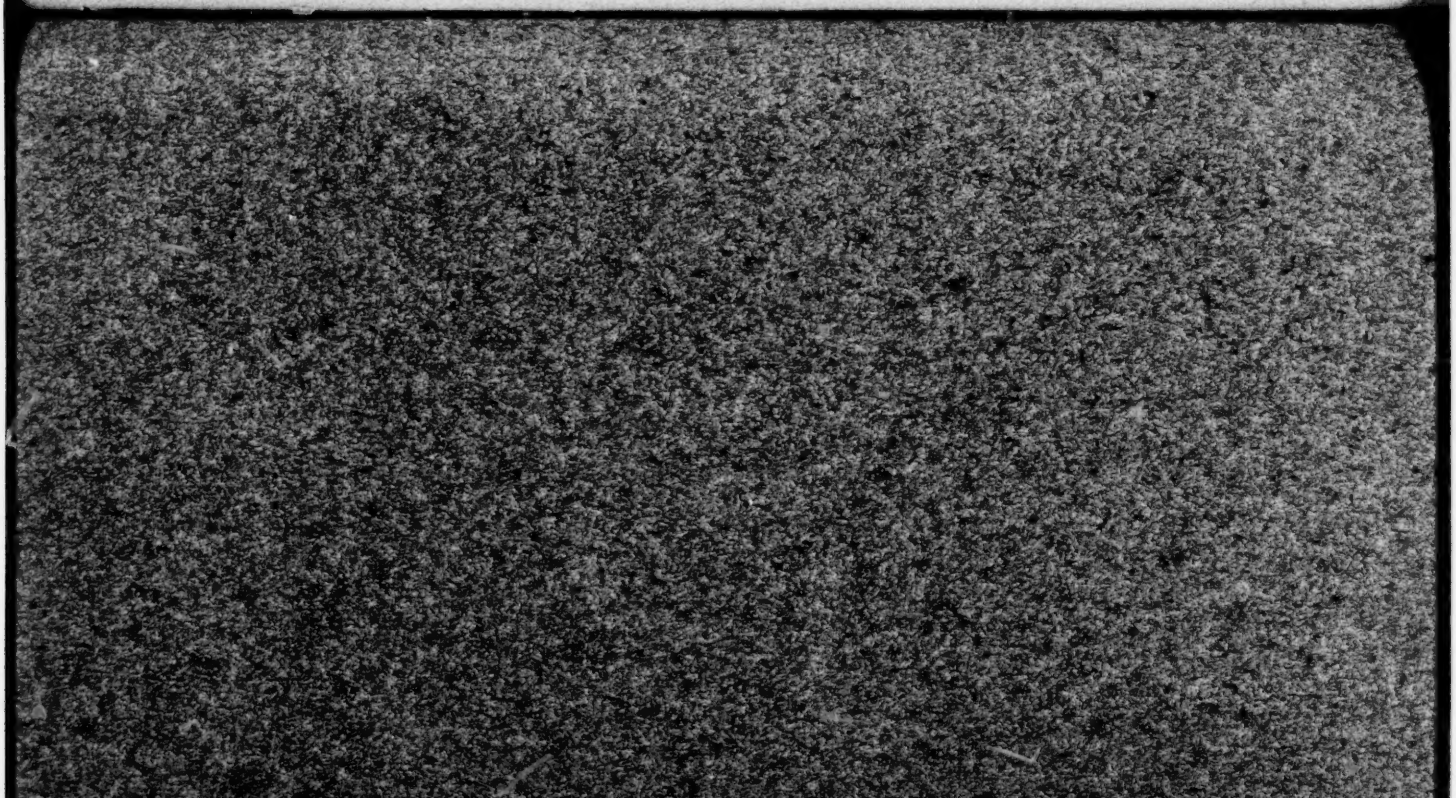
In the State of ILLINOIS there are 53 cities with a population (in 1900) of 5,000 and over, incorporated under the general incorporation law. Of these 53 cities, there were only two outside of Chicago, that is, *Peoria* and *Joliet*, having ordinances attempting to require the baker to sell loaf bread by definite weight only.

FLOUR VALUES.

Range of prices per barrel during each week in 1907.

		Winter wheat patents.	Good to choice winter wheat.	Spring wheat patents.	Minn. bkrs., good to choice, in 140-lb. jute sacks.	Minn. hard wheat straights, in 140-lb. jute sacks.	Low grade.	Good to choice rye.
January	4	3 20@3 50	2 50@3 40	2 70@3 80	2 50@2 80	3 15@3 40	2 15@2 30	3 10@3 40
	11	3 20@3 50	2 50@3 40	2 70@3 80	2 30@2 60	3 15@3 40	2 05@2 30	2 90@3 30
	18	3 20@3 50	2 50@3 40	2 70@3 80	2 30@2 60	3 15@3 40	2 05@2 30	2 90@3 30
	25	3 20@3 50	2 50@3 25	3 70@3 80	2 30@2 80	3 30@3 50	2 05@2 30	2 90@3 30
February	1	3 20@3 50	2 50@3 25	3 70@3 80	2 30@2 80	3 30@3 50	2 05@2 30	2 90@3 30
	8	3 20@3 50	2 50@3 25	3 70@3 80	2 30@2 80	3 30@3 50	2 05@2 30	2 90@3 30
	15	3 20@3 50	2 50@3 25	3 70@3 80	2 30@2 80	3 30@3 50	2 05@2 30	2 90@3 30
	22	3 20@3 50	2 50@3 25	3 50@3 60	2 30@2 70	3 30@3 50	2 00@2 30	2 90@3 30
March	1	3 20@3 50	2 50@3 25	3 50@3 60	2 30@2 70	3 30@3 40	2 00@2 30	2 80@3 10
	8	3 20@3 50	2 50@3 25	3 50@3 60	2 30@2 90	3 30@3 40	2 00@2 30	2 80@3 10
	15	3 10@3 40	2 40@3 15	3 40@3 50	2 20@2 80	3 20@3 30	1 90@2 10	2 70@3 00
	22	3 10@3 40	2 40@3 15	3 40@3 50	2 20@2 80	3 20@3 30	1 90@2 10	2 70@3 00
	29	3 10@3 40	2 40@3 25	3 [illegible]@3 50	2 20@2 80	3 20@3 30	1 90@2 10	2 80@3 20
April	5	3 10@3 40	2 40@3 25	3 40@3 50	2 20@2 80	3 20@3 30	1 90@2 10	2 90@3 20
	12	3 10@3 40	2 40@3 25	3 40@3 50	2 20@2 80	3 20@3 30	1 90@2 10	2 90@3 20
	19	3 10@3 40	2 40@3 25	3 40@3 50	2 20@2 80	3 20@3 30	1 90@2 10	2 90@3 20
	26	3 10@3 40	2 40@3 25	3 40@3 50	2 20@2 80	3 20@3 30	1 90@2 10	2 90@3 40
May	3	3 25@3 55	2 55@3 40	3 55@3 65	2 35@2 95	3 35@3 45	2 05@2 25	3 15@3 35
	10	3 40@3 70	3 00@3 45	3 80@4 50	2 35@2 95	3 35@3 45	2 10@2 35	3 00@3 30
	17	3 80@4 10	3 30@3 80	4 50@5 10	2 65@3 50	3 60@4 05	2 25@2 45	3 50@3 75
	24	4 00@4 30	3 50@3 90	4 90@5 40	2 85@3 75	4 00@4 45	2 40@2 75	3 65@3 85
	31	3 90@4 20	3 35@3 95	4 75@5 30	2 85@3 75	4 00@4 45	2 40@2 75	3 65@3 85
June	7	3 90@4 20	3 35@3 95	4 75@5 30	2 85@3 75	4 00@4 45	2 50@2 90	3 65@3 85
	14	3 70@4 00	3 10@3 70	4 50@5 00	2 75@3 50	3 75@4 15	2 25@2 40	4 10@4 60
	21	3 70@4 00	3 10@3 70	4 50@5 00	2 75@3 50	3 75@4 15	2 25@2 40	4 10@4 60
	28	4 15@4 35	3 30@4 10	4 50@5 00	2 75@3 50	3 75@4 15	2 25@2 40	4 00@4 30
July	5	4 15@4 35	3 30@4 10	4 50@5 00	2 75@3 50	3 75@4 15	2 25@2 40	4 00@4 30
	12	4 10@4 40	3 00@4 20	4 70@4 90	3 00@3 50	4 30@4 60	2 15@2 40	4 00@4 40
	19	4 10@4 40	3 00@4 20	4 70@4 90	3 00@3 50	4 30@4 60	2 15@2 40	4 00@4 40
	26	4 10@4 40	3 00@4 20	4 70@4 90	3 00@3 50	4 30@4 60	2 15@2 40	4 00@4 40
August	2	4 10@4 40	3 00@4 20	4 70@5 10	3 00@3 50	4 30@4 60	2 15@2 40	4 00@4 40
	9	4 10@4 40	3 00@4 20	4 70@5 10	3 00@3 50	4 30@4 60	2 15@2 40	4 00@4 40
	16	4 00@4 20	3 00@3 95	4 80@4 90	3 00@3 50	4 40@4 60	2 15@2 45	4 45@4 60
	23	3 90@4 20	3 00@3 95	4 80@4 90	3 00@3 50	4 40@4 60	2 15@2 45	3 65@4 00
	30	4 00@4 30	3 10@4 05	4 80@4 90	3 00@3 65	4 40@4 60	2 15@2 45	3 85@4 10
September	6	4 20@4 50	3 30@4 25	5 00@5 10	3 20@3 85	4 60@4 80	2 35@2 45	4 05@4 30
	13	4 20@4 50	3 30@4 25	5 00@5 10	3 20@3 85	4 60@4 80	2 35@2 45	4 05@4 30
	20	4 20@4 50	3 30@4 25	5 10@5 50	3 30@3 95	4 70@4 90	2 45@2 75	4 15@4 40
	27	4 20@4 50	3 30@4 25	5 10@5 20	3 30@3 95	4 70@4 90	2 45@2 75	4 15@4 40
October	4	4 20@4 50	3 30@4 25	5 10@5 20	3 30@3 95	4 70@4 90	2 45@2 75	4 25@4 75
	11	4 65@5 10	3 60@4 90	5 40@5 75	3 60@4 20	5 30@5 75	2 80@3 10	4 30@4 85
	18	4 65@5 10	3 60@4 90	5 40@5 75	3 60@4 20	5 30@5 75	2 80@3 10	4 30@4 85
	25	4 40@4 75	3 50@4 65	5 40@5 70	3 60@4 20	5 00@5 10	2 90@3 20	4 20@4 60
November	1	4 40@4 75	3 50@4 65	5 20@5 60	3 60@4 20	4 85@5 00	3 00@3 30	4 10@4 40
	8	4 25@4 75	3 40@4 50	5 10@5 40	3 50@4 10	4 55@4 90	2 90@3 30	3 90@4 25
	15	4 30@4 85	3 50@4 55	5 20@5 50	3 50@4 25	4 65@4 90	3 00@3 40	3 90@4 25
	22	4 30@4 80	3 75@4 55	5 20@5 40	3 50@4 25	4 60@4 80	3 00@3 40	3 90@4 25
	29	4 30@4 80	3 75@4 55	5 25@5 40	3 90@4 15	4 30@4 80	3 00@3 40	3 90@4 20
December	6	4 30@4 80	3 80@4 65	5 20@5 40	3 90@4 15	4 30@4 80	3 00@3 40	3 90@4 20
	13	4 40@4 80	3 75@4 65	5 20@5 50	3 80@4 25	4 65@4 85	2 95@3 20	3 95@4 35
	20	4 40@4 80	3 75@4 55	5 20@5 70	3 80@4 25	4 65@4 85	2 95@3 20	3 95@4 35
	27	4 40@4 80	3 75@4 55	5 20@5 70	3 80@4 25	4 65@4 85	2 95@3 20	3 95@4 35





IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 115.

MATHIAS SCHMIDINGER, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO, ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The brief of the defendant in error contains several statements concerning the evidence in the case which we cannot permit to go unchallenged. On page 4 of that brief it is said:

> "A *very inconsiderable* number of loaves of bread are sold in Chicago which weigh *over six pounds.*"

While the number of loaves weighing six pounds or less are of course much greater than the number of loaves weighing *over* six pounds, the evidence leads to the irresistible conclusion that the *daily* sales of such large loaves amounted to hundreds, and probably to thousands, these

loaves being particularly sought by the foreign population resident in Chicago, such as those of the Polish and Jewish elements, forming such a substantial part of the city's population.

> "Q. I will ask you this: You say in certain localities this bread (Exhibit S, the loaf weighing over ten pounds) is *commonly* sold; what localities?
> "A. Mostly Polish.
>
> * * * * * * *
>
> "Q. Which localities comprise only a small part of the population of Chicago?
> "A. I don't know. There is a pretty big population of Polish people here.
> "Q. The population of Polish districts where that bread is sold *ordinarily*?
> "A. Probably one twenty-fifth.
> "Q. I mean as to the people living there?
> "A. One twenty-fifth of the people living there.
> "Q. Of the city?
> "A. Yes.
> "Q. 100,000?
> "A. Yes.
> "Q. Or 50,000 or 80,000 anyway?
> "A. Yes."
>
> Printed Record, p. 68.
>
> * * * * * * *
>
> "Q. Do you know the object of these large loaves?
> "A. Yes.
> "Q. What is it?
> "A. The object is to give a better loaf of bread; the people prefer not to have so much crust, and the bread keeps moister in larger pieces like that than it does in smaller pieces."
>
> Printed Record, p. 69.

In this connection another statement in defendant's brief deserves mention. Counsel say:

> "There is no evidence of any demand for such bread."
>
> Defendant's Brief, p. 4.

The evidence shows that these large-size loaves are *commonly* sold in certain localities of the city. Can there be better proof for the existence of a constant *demand* than the fact that such loaves are *commonly* sold?

Again, on the same page of defendant's brief, we find a statement that the record discloses no *demand* for bread weighing exactly the *weights* of the loaves introduced in evidence as sold to the restaurant trade.

While the statement may be *technically* correct, it is misleading. Bread not being sold by *weight*, there was of course no proof of a demand for bread *weighing* exactly the weights of the loaves in question. But the proof is abundant and uncontradicted that there was a demand for bread of such *sizes* which could not be made as to *weight* to correspond with the weights prescribed in the ordinance. While the difference between the weight of one or two of those loaves and the nearest permissible weights of the ordinance is rather small, as to quite a number of the other loaves *the difference is substantial*.

In this connection we may be pardoned to quote the following from the record:

First. As to the loaf weighing 31 ounces when baked (Printed Record, p. 84):

> "Q. I will hand you this loaf of bread, the Keystone Bread, and ask you whether your customers demand a loaf of exactly that size or not?
> "A. They do."

Second. As to the loaf weighing 2 pounds and 6 or 7 ounces (Printed Record, pp. 85, 86):

> "Q. Isn't this the reason why they want these particular shapes of loaves, that they want as little crust as possible?
> "A. Yes.
> "Q. And they want it to fit the cutting machines that they have?
> "A. Yes.

* * * * * * *

"Q. And according to their custom and trade they require a certain shape and these are the shapes in which you have been contracting with them for during your course of business, contracting for in the ordinary course of business with the restaurant trade in the city of Chicago? Isn't that it?

"A. It is."

(Printed Record, p. 86.)

Third. As to the loaves weighing 1 pound and 8 ounces:

"Q. Have you got a constant and daily demand for bread weighing exactly or about that much for bread of that size?

"A. We have.

"Q. How many loaves of bread a day have you been selling in the last year or two years on the average per day of bread of that exact size?

"A. Of this particular size here, well, this part of it fell off very much, possibly seven or eight hundred loaves a day of this kind."

(Printed Record, pp. 86, 87.)

Fourth. As to the loaves weighing one pound nine ounces and a half:

"Q. Have you any considerable orders for exactly this size of bread?

"A. Not very much; we have possibly four different customers that get this special loaf.

"Q. How many loaves of bread do you sell of that on an average?

"A. I would judge about 75."

(Printed Record, p. 87.)

Fifth. As to the loaves weighing one pound ten ounces and a half:

"Q. How many loaves of that do you sell a day, on an average, at this season of the year?

"A. About 1,000 loaves.

"Q. 1,000 loaves. Is this a size which has been agreed upon between your customers and yourself?

"A. It is.

"Q. They want that particular size?

"A. They want that particular size.

"Q. Is it sold with or without reference to the weight?

"A. Without reference to the weight.

"Q. It is the size and the shape of the loaf that is in demand?

"A. Shape of the loaf.

"Q. They want that particular bread for their particular purposes?

"A. They do.

"Q. Isn't it a fact that for this restaurant trade the important part of the bread is how it will cut up in sandwiches?

"A. With as little waste as possible.

"Q. And to fit their cutting machines?

"A. To fit their cutting machines, and also these are used for the cheaper cut up in sandwiches. That is the 5-cent sandwiches.

"Q. In other words, the various restaurants which have various kinds of trade and which serve and sell sandwiches of various sizes make special contracts with you as to special sizes for these uses and these sizes have the weights that you have testified to and that has been the custom of your business for years?

"A. Yes.

"Q. And is the custom today?

"A. It is.

"Q. Could you satisfy the requirements of your trade if you were to bake those loaves in accordance with this ordinance in the 1-pound, 2-pound, 3-pound, 4-pound, 5-pound, and 6-pound loaves?

"A. I don't think I could.

"Q. Why not?

"A. The parties want a certain size.

"Q. A certain length and a certain height and a certain width?

"A. Yes."

Sixth. As to the loaves weighing one pound and six ounces:

"Q. Have you got a constant demand and have you had for years for a French bread weighing one pound six ounces?

"A. We have.
"Q. Is that a bread that is in demand in trade?
"A. It is.
* * * * * * *

"Q. And you have been supplying your customers on an average with how many loaves a day, weighing a pound and six ounces?
"A. Seven to eight hundred loaves a day."
Printed Record, pp. 89, 90.

We also consider it our duty to challenge the following statement in brief of defendant in error:

"These loaves could be made to accommodate the needs of the restaurant trade by complying with the ordinance if the baker changed the size of his pans in which the loaves of bread are baked for restaurant use."
Defendant's Brief, p. 4.

While the evidence shows that there is no technical difficulty of baking loaves of bread substantially of the weights required by the ordinance, yet the evidence also demonstrates that loaves of bread of those weights would *not* accommodate the needs of that trade.

"Q. By using a larger pan you could bake a 2-pound loaf of bread without any difficulty. Take the Jumbo bread, indicating Exhibit Z. That weighs 2 pounds 6 ounces, that could be made in a 2-pound loaf, could it not, the same size and shape, and a little shorter?
"A. It could so far as that goes, though the restaurant men would lose at least one slice or possibly two."
Printed Record, p. 94.

Respectfully submitted.

HARRY RUBENS,
BENJAMIN F. NINDE,
Counsel for Plaintiff in Error.

Population of Chicago.

Foreign-born Population of Chicago, Twelfth Census, Distributed According to Country of Birth, 1900.

Austria		11,815	
Bohemia		36,362	
Canada		34,779	
Denmark		10,166	
England		29,308	
France		2,989	
Germany		170,738	
Holland		18,555	
Hungary		4,946	
Ireland		73,912	
Italy		16,008	
Norway		22,011	
Poland (Austrian & German)	42,494		
Poland (Russian & unknown)	15,219		
		57,713	
Russia		24,178	
Scotland		10,347	
Sweden		48,836	
Switzerland		3,251	
Wales		1,818	
Total		587,112	(*i. e.*, 577,732)
Native population		1,111,463	
Total population		1,698,575	

Supreme Court, U. S.
FILED.
DEC 30 1912
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

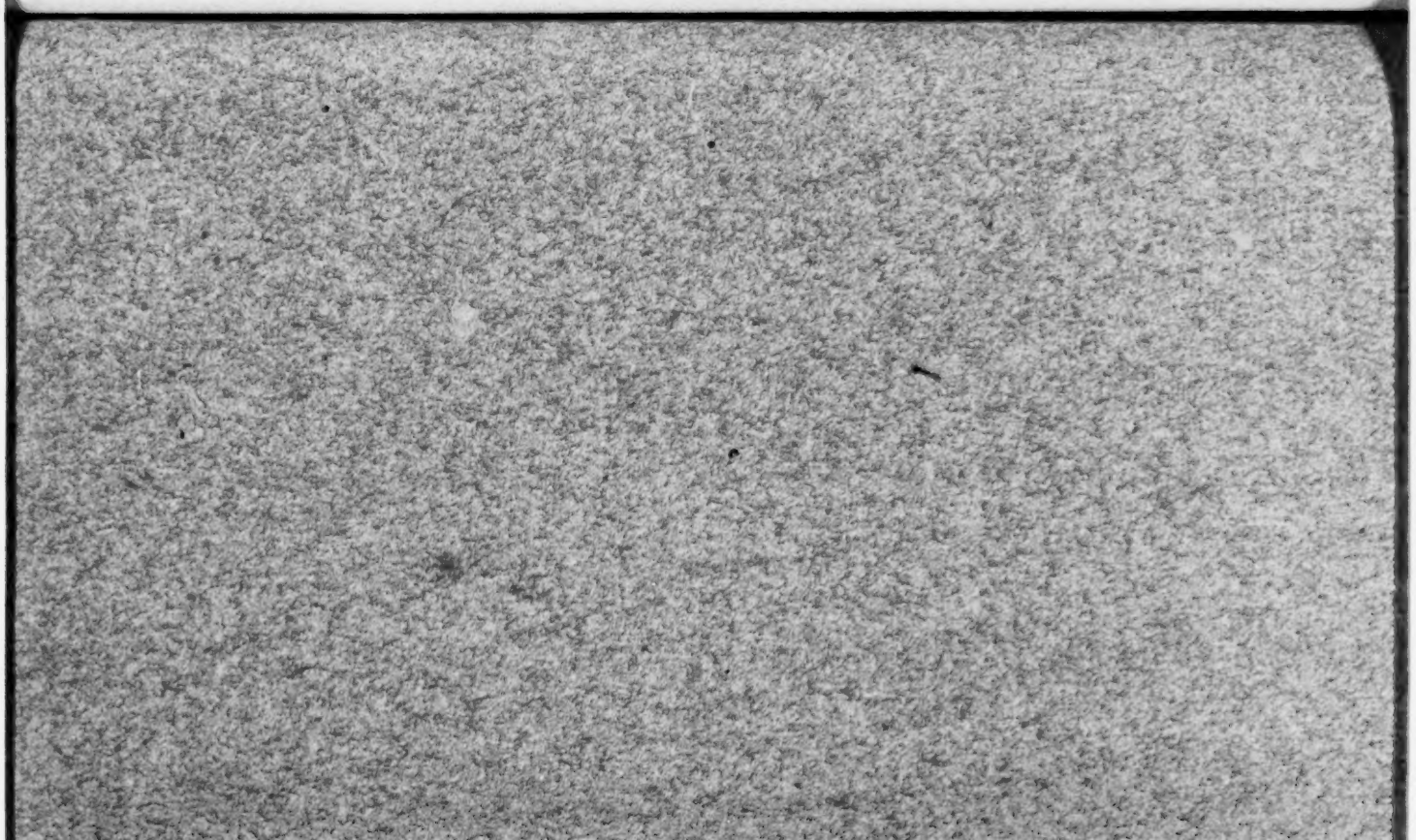
No. 115

MATHIAS SCHMIDINGER,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO, ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPENDIX TO REPLY BRIEF OF PLAINTIFF IN ERROR.

HARRY BURNS,
BENJAMIN F. NIELDS,
Counsel for Plaintiff in Error.



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ORAL OPINION OF JUDGE WINDES AS DELIVERED IN DECIDING THIS CASE IN THE CIRCUIT COURT.

In view of the importance of this case, I would take the time to carefully review the numerous decisions that have been cited by counsel, but the pressure of judicial work is so great that the court is of opinion that it is really time lost, because if these cases are reviewed, as no doubt they will be, it is of very slight importance to the reviewing court that this court should discuss the numerous authorities cited.

The basic question presented here, as it seems to the court, is as to the validity of Paragraph 52 of Section 1 of Article V of the City and Village Act. I thought that I had it marked, but I have not, so I cannot give the exact language of it, but as I remember counsel's statement of the section, it clearly gives to the City Council the right to fix the weight of bread, as well as the quality of the bread. That is a specific power given to the City Council, I think, and there is some doubt in the mind of the court, after hearing counsel's extensive arguments upon it, as to whether it violates the sections of our State Constitution referred to by counsel in the argument, especially Sections 1 and 2 of Article II of our State Constitution, and the Fourteenth Amendment of the Constitution of the United States.

However, in view of the fact that the power of the

legislature of this state to pass laws is unlimited, practically, unless specifically limited by the Constitution which affects that power, as was referred to in the argument of Mr. Cassels, and the court called attention to it. The question was very thoroughly and fully discussed,—when the legislature of this state passed an act which gave to the Park Commission of Lincoln Park the fee of certain portions of the bed of Lake Michigan. It was very strenuously argued by the Attorney General and his assistants, in that case, that that was beyond the power of the legislature. I think there were at least ten different counsel in the case, and no case that I ever tried in this county ever impressed me with its importance any more than that. I held that it was within the power of the legislature to make that grant, and it was sustained by the Supreme Court. I think that is about twelve years ago. I don't remember the book and page, but the matter which especially impressed me there was as to the supreme power of the legislature unless it was limited by the Constitution.

In view of that general proposition and the further one that I think is a very important one, that it is the duty of every trial court, as argued by Mr. Cassels, that every presumption be indulged in favor of the validity of any legislation of this state, and that our Supreme Court, in at least two cases, I remember particularly the Drainage Canal case, when the validity of that law was being discussed before it, made use of some such language as this: That it is the duty of the court in passing upon the constitutionality of any act of the legislature to sustain it unless it was invalid beyond all reasonable doubt, this court has endeavored

on all questions which have been presented to it, involving the validity of any act of the legislature, to be guided by that general rule. For the judiciary to assume the province of declaring void any legislation of the state when there is a reasonable question as to its validity, I think is going beyond its legal rights and duties. In that connection, however, within the last two years I have resolved the doubt in favor of different acts of the legislature of this state, but I was reversed by the Supreme Court, and it seems to me that the decisions of our Supreme Court within the last few years have been stronger than they ever have been heretofore, since the Supreme Court has existed in this state, in declaring legislation invalid as violating the Constitution. I don't say that by way of criticism at all of the Supreme Court, but I think that it has gone to a greater extent in a number of its decisions in declaring legislation invalid than any decision of the Supreme Court prior to ten years ago.

While I consider there is a very grave doubt as to the validity of this section of the City Charter, I regard it my duty to hold that that section is within the power of the legislature, because I regard it my duty to give the benefit of the doubt to the Act of the legislature. So the ruling of the court with regard to the validity of Section 52 of the City Charter is that it is not invalid as being unconstitutional.

Whether this ordinance here in question is reasonable within the power given to City Councils by virtue of that section, I think is a very, very different question. In other words, whether this ordinance is a reasonable exercise of the power given to the City

Council as to the fixing of the weight of bread, and whether that ordinance by its terms violates the sections of the Constitution of this state and of the United States which have been referred to.

The Fourteenth Amendment, in so far as material here to the Constitution of the United States, says:

> "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Then Section 2 of Article II of the State Constitution:

> "No person shall be deprived of life, liberty or property without due process of law."

Section 2 of this ordinance fixes the weight of every loaf of bread made, procured for the purpose of sale, sold, offered or exposed for sale in the City of Chicago. It shall weigh one pound, or it shall weigh a half a pound, three-quarters or it shall be two pounds, three, four, five or six pounds, and every loaf of bread which is made or procured for the purpose of sale, sold, offered or exposed for sale in the city shall be of these weights and they shall be made in no other way.

And Section 4 of the same ordinance says: "Any bread, the loaf or loaves of which are not standard," that is, referring to a pound loaf, "half, three-quarters, double, triple, quadruple, quintuple or sextuple loaves, as defined in Section 2 of this ordinance, which may be made or sold or offered or exposed for sale within the City of Chicago" it is said "is a violation of this ordinance" and the penalty fixed is a fine not less than ten dollars nor more than one hundred dollars.

As I construe that section, in connection with the second section of the ordinance, in view of the decisions which I will not undertake to refer to or discuss at this time, THERE IS A CLEAR VIOLATION OF THE RIGHT TO CONTRACT by any baker or person selling bread in the City of Chicago, because without selling a half loaf or three-quarters of a loaf of bread no contract can be made for the sale or manufacture of any bread where the loaf does not weigh a half a pound or three-quarters of a pound, one, two, three, four, five or six pounds. In view of the evidence presented here IT IS CLEARLY ESTABLISHED I THINK THAT THERE IS A VERY CONSIDERABLE DEMAND FOR BREAD OF DIFFERENT WEIGHTS THAN THE ONES PRESCRIBED BY THE ORDINANCE, and while it is possible, in view of the evidence here, for the manufacturers to comply with this ordinance, though not a strict compliance, I think THERE CAN BE NO QUESTION BUT THAT IT DEPRIVES THE MANUFACTURERS OF BREAD OF THEIR RIGHT UNDER THESE CONSTITUTIONAL PROVISIONS TO CONTRACT FOR THE SALE OF BREAD IN DIFFERENT FORMS FROM THAT PRESCRIBED BY THE ORDINANCE.

Then it seems to me also that if it be conceded that this ordinance does not exceed the letter of the City Charter with regard to prescribing the weight of loaves of bread, it is a very unreasonable ordinance considering the usual and ordinary course of manufacture of bread within the city for years past, and it is conceded by counsel in argument here, as I understood, that there must be at least a reasonable compliance through the ordinance with the statute which gives the City Council the right to prescribe the weight of bread. For instance, if the council had

passed an ordinance here requiring every loaf of bread to weigh 20 pounds, it would be so unreasonable as not to be within the purview of the statute at all.

For the same reason I think the ordinance should be held unreasonable, because there is no limit of time within which the bread should be of a certain weight, as prescribed by the ordinance. It is true there is some basis for the argument on behalf of the city here, that it is more reasonable, as the ordinance stands, than it would be if a specified limit of time were fixed, but in view of the evidence here with regard to how bread may be affected by surrounding conditions after it is taken from the oven, the difficulty in fixing accurately the weight of each loaf before it is baked, the court is of the opinion that the ordinance in order to be valid should fix the time with reference to when the bread is baked, or when it is exposed for sale, as to what weight it should be.

It seems to the court also it is very unreasonable that this ordinance, while it says there may be half pound loaves or three-quarter pound loaves, it in effect says there can be no loaf of one pound and a half or one and three-quarters, or any fraction of a pound as to any loaf from two up to six pounds.

IN VIEW OF THE DEMANDS HERE BY THE TRADE IN THE CITY OF CHICAGO FOR BREAD OF CERTAIN WEIGHTS, FOR THE LUNCH COUNTERS AND SANDWICHES AND SO ON, IT SEEMS TO ME THAT THE ORDINANCE IS UNREASONABLE IN THAT IT DOES NOT ALLOW THE BAKER TO CONTRACT WITH THE CONSUMER AS TO LOAVES OF BREAD OF A SPECIFIC WEIGHT.

A good deal was stated by counsel in the argument as to the ordinance being a violation of the Constitution in that it was special legislation, referring, no doubt, to Section 22 of Article IV of the Constitution, but no proposition of law has been presented upon that point. Also that it is special in that it makes a distinction between the sellers of loaf bread while it is fresh and when it is stale. As counsel put it, in substance a baker could under this ordinance bake his bread and keep it until it is stale and then sell it, without violating the ordinance. I think that, while a logical conclusion from this ordinance, is not a reasonable one, because it is not supposed that any baker would bake bread and keep it to sell purposely as stale bread, although it is possible under the ordinance that he could do this and not be subject to the penalties of the ordinance, no matter what kind of a loaf he might make, if he sold it as stale bread. That being rather a strained construction of the ordinance, in view of what would be the ordinary course of business, I do not think that the ordinance should be held to be special legislation.

Now, with the exceptions under Section 5 of the ordinance, by which it is said that it shall not apply to "crackers, pretzels, biscuits, buns, scones, rolls or fancy bread weighing less than one-quarter of a pound, or to what is commonly known as stale bread," I think it is, omitting the stale bread provision there, quite doubtful as to whether there is not a distinction made there which would place it as class legislation, because we all know that there is a great deal of this class of bread which is used, and

because there is a doubt as to whether that could be construed as special legislation in favor of a particular class and discriminating against the bakers of loaf bread. I think the ordinance should not be held to be invalid because it is class legislation.

In substance it is the holding of the court that the ordinance itself as to Sections 2 and 4, there being no question made as to Sections 1 and 3 as invalid, because it interferes with the right of contract as provided by the constitutional provisions referred to and it is unreasonable. It is also in restraint of trade, that resulting from the fact that under the ordinance no contract could be made for the sale of any bread except as provided in the ordinance. It is unreasonable because it fixes no time at all as to when the weights of the different loaves of bread should be determined.

The discussion by the court of the bread cases, particularly of Alabama, Louisiana and Michigan cases, I regard as unnecessary, because of the extent of the Massachusetts Constitution, on which the Detroit case, the Michigan case, is based, or, rather, the decisions of the Massachusetts court on its constitutional provision; and because the Alabama and Louisiana cases, I regard as cases which should not control this court in passing upon the validity of this ordinance, because the conditions and circumstances under which those cases were decided is so different from what they are in the City of Chicago today. And while those cases may have been in point with what was known in all English-speaking communities to be the law then, I do not think that they should

control here, under the changed conditions and circumstances of this great city.

New Orleans, at the time the Louisiana case was decided, could not have had more than one-tenth of the population that there is here, and the population was vastly different from that in the City of Chicago. The City of Mobile at the time the Alabama case was decided could not have had one one-hundredth part of the population that Chicago has today.

I will state to counsel I would be glad to give this case careful attention and write my views if I had the time and discuss the numerous authorities that have been cited, but for reasons that I have referred to I do not think it necessary and I will hold the propositions of law as to Sections 2 and 4, except the provision of Section 4 relating to violations of Section 1 as invalid, but I would not hold Section 3 of the ordinance invalid, because counsel for defendant in his argument said that there was no question as to Section 3.

It would follow from this holding that there could be no recovery in this case and judgment for the defendant will follow.

THE FIRST BREAD ORDINANCE OF THE CITY OF NEW YORK AFTER THE ESTABLISHMENT OF THE UNION.

"A Law for Establishing the Assize and Regulating the Inspection of Bread.

Passed 2d March, 1812.

Sec. 1. Be it ordained by the Mayor, Aldermen and Commonalty of the City of New York, in Common Council convened, That every baker or other person, who shall use or carry on the trade or business of a baker, either in person or by employing any other person to use or carry on the said trade or business, under his or her directions, or for his or her profit or benefit, within the City of New York, shall cause all loaf bread whatsoever, which he or she shall bake, or cause or procure to be baked, to be marked with the initial letters of his, her or their christian and surnames, plainly to be seen on each loaf thereof; and all loaf-bread which shall not be so marked, shall be forfeited, and shall and may be seized and disposed of to and for the use of the poor of the City of New York, and the person or persons so offending, shall also forfeit and pay ten cents for every loaf thereof, so neglected to be marked as aforesaid.

2. And be it further ordained, That all bakers or other persons using or carrying on the trade or business of a baker as aforesaid, shall make or cause to be made, all their loaf bread, of good and wholesome flour, or meal, and according to the assize es-

tablished in conformity to this ordinance, or any other ordinance hereafter to be passed, directing the assize of loaf-bread, and all loaf-bread baked within the city of New York, which shall be found not to have been made of good and wholesome flour or meal, or not to be of good quality, or wanting in weight, according to the assize established at the time, shall be forfeited, and shall and may be seized and disposed of to, and for the use of the poor of the city of New York; and the baker or person who shall cause or procure the same to be baked, shall moreover forfeit and pay ten cents for every loaf thereof.

3. PROVIDED ALWAYS, AND BE IT FURTHER ORDAINED, That no bread shall be forfeited in consequence of the directions and provisions aforesaid, for the want of weight only, unless the same shall be ascertained within eight hours after the same is baked, and that whenever any loaf-bread shall be inspected or weighed to ascertain the weight thereof, more than eight hours after the same shall have been baked, the Inspector or Inspectors of bread shall respectively make such allowance as in his or their judgment shall be just, having regard to the time the same shall have been baked more than eight hours; and if the same shall be found deficient in weight after making such allowances, the same shall be forfeited in the same manner, as though it had been inspected or weighed within the eight hours after the same was baked, and then found under the due weight, according to the assize, and whenever an allowance respecting the weight of bread shall be claimed on account of its having been baked eight

hours as aforesaid, the burden of the proof respecting the time when it was baked, shall be on the baker or proprietor thereof.

4. And be it further ordained, That the Inspector or Inspectors of bread, shall when inspecting or weighing bread, make such allowance as in his or their judgment shall be just for any deficiency of weight, only in what are commonly called split or twisted loaves.

5. And be it further ordained, That the Common Council of the city of New York, shall once in every six months and oftener if they shall deem it necessary, appoint three fit persons to be Inspectors of bread and assign one of such Inspectors to each of the districts hereinafter established, whose duty it shall be to inspect and examine all loaf-bread baked as aforesaid on the same day, on which the same shall be baked, and ascertain and determine whether the same is marked as is hereby required, and whether the same is made of good and wholesome flour or meal, and whether the same is of good quality, and to ascertain the weight thereof, and to determine whether the weight be sufficient according to this ordinance and the established assize: And for those purposes every such Inspector shall have power and authority, at all suitable times to enter any bake house, shops, store-house or other building, or inclosure where any loaf-bread shall be baked, stored or deposited or kept within the district so to be assigned to him: And also to stop and detain in any street, whether the same shall be within his inspection district or not, any baker or other person or persons, with their wagons or other carriages,

carrying any loaf-bread baked within the city as aforesaid: And there or in any other suitable place, to inspect, examine, weigh and determine respecting such loaf-bread, according to the true intent and meaning of this ordinance: And if the same or any part thereof shall be forfeited and liable for seizure for not being conformable to the directions herein contained, the said Inspectors so stopping or detaining such bread, shall immediately or within six hours thereafter, convey or cause to be conveyed all such bread as shall be forfeited for any of the causes aforesaid, to the Alms-House of the city of New York, there to be left for the use of the poor of the said city; and if any loaf-bread shall be forfeited as aforesaid, and shall, after the same has been inspected or examined by the Inspector as aforesaid, and within six hours thereafter be conveyed or concealed, so that the Inspector shall not be able to find the same immediately to convey it to the Alms-House as aforesaid, the person or persons, in whose bake-house, shop, store-house, or inclosure, the same shall have been left by the Inspector, after ascertaining the forfeiture thereof, shall forfeit and pay for every loaf thereof so conveyed away or concealed twelve and an half cents: And it shall be the duty of such Inspector to inspect and examine the loaf-bread baked within the inspection district, so to be assigned to him on the same day on which the same shall be baked, so far as it shall be practicable for him so to do.

6. And be it further ordained, That this city shall be divided into three inspection districts; that the First District shall include all such parts of

the city as are southward and eastward of a line commencing at Roosevelt street on the East River; thence proceeding along the middle of said street, to Chatham street, thence along the middle of said street, to Hudson river; and that the Second District, shall include all such parts of the city as are Eastward and within a line commencing at Roosevelt street, aforesaid on the East river aforesaid, and running thence along the middle of said street to Chatham street, thence along the middle of said street to the Bowery lane, thence along the middle of Bowery lane to Grand street, thence along the middle of Grand street to Broadway, thence along the middle of Broadway to the highway called King's-bridge road, thence along the middle of said highway to a place opposite to the middle of Bellevue lane and thence along Bellevue lane to the end thereof, and thence continuing in the same direction to the East river. And that the Third District shall include all the remainder of the city not included in the first or second districts.

7. And be it further ordained, That each of the Inspectors shall receive as a compensation for his services the annual sum of Four Hundred Dollars, payable in equal quarterly payments.

8. And be it further ordained, That the said Inspectors to be appointed as aforesaid shall before entering on the execution of the duties of their office, respectively take an oath or affirmation before the Mayor or Recorder well and faithfully to execute the powers and trusts reposed in them without favour or partiality.

9. And be it further ordained, That it shall be the duty of the Chamberlain to publish every Sat-

urday in two of the daily newspapers printed in this city, an assize of bread for the ensuing week, according to the form hereinafter mentioned; and further, that in fixing the assize, the said Chamberlain shall estimate a barrel of flour to produce 4032 ounces of bread; and in order to ascertain the weight of a shilling loaf of the respective qualities of flour, the number of ounces shall be divided by a number equal to the number of shillings, a barrel of flour of such quality may be worth, at the time of fixing the assize, and the number 28 added thereto (being 28 shillings allowed to the baker) and the quotient will be the number of ounces a shilling loaf shall weigh, in the following manner:

Suppose a barrel of fine flour	72 shillings.
Compensation for baking	28 do
	100 shillings.

Divide 4032 by 100, the quotient will be 40 32-100 being the ounces the shilling loaf must weigh; and that whenever the fractional parts are less than one-half an ounce, they shall be taken off the loaf, and when half an ounce or more, an ounce shall be added to it; and further, that it shall be the duty of the Chamberlain to deliver an account of the assize he may so establish, to the Inspector of bread, or any baker, whenever called upon so to do.

Form of assize to be published.

	Shilling loaf.	6d loaf.
Superfine wheat flour,	Oz.	Oz.
Do. mixed with Indian meal,	Oz.	Oz.
Do. mixed with Rye meal,	Oz.	Oz.
Rye flour.	Oz.	Oz.

10. And be it further ordained, That all the mixed bread, whether baked with superfine flour and Indian meal, or superfine flour and rye meal, the assize thereof shall be made by the Chamberlain and Inspectors, or a major part of them, as they shall in their judgment think fit and proper."

District of Columbia
vs.
George Hauf.

WASHINGTON, D. C., October 27, 1908.

OPINION OF JUSTICE KIMBALL.

In the argument on the motion filed in this case, there have been quite a large number of very important questions raised, which I do not, in the view I take of the ordinance, think it necessary for me to decide.

One of the most important of these questions raised by the defendant's attorney was that this ordinance when enacted applied only to part of the District of Columbia included within the territory known as the City of Washington and that Congress when it abolished said city as a corporation and created a new corporation known as the District of Columbia covering the whole of the territory of the District, did not extend the ordinances of the City of Washington to cover the whole of the new municipality and that said ordinance thereby became void or absolete, as it subjected a baker residing in the City of Washington to a penalty and did not apply to his competitors residing in the old county of Washington, the latter having no restrictions upon the size of the loaves he might bake and the baker in the old city of Washington being subjected to a penalty unless he baked loaves of the specified weight named in the ordinance.

It is not necessary under my view of this case to decide this question.

Another question which it is not necessary for me to decide is as to the effect upon this ordinance of the power of search contained therein.

This law was passed on January 7, 1858, and, as far as has been disclosed here, only a part of it has ever been enforced. The part of it that has been enforced from time to time is a portion of Section 2; but that portion of Section 2 which requires that the figures "1," "2" and "4" be stamped upon each loaf never has been enforced. Neither has any part of Section 3, which provides that all other bread, buns, rolls, crackers, biscuits, cakes or baked dough, not before described, shall be sold by actual weight in avoirdupois pounds and ounces.

It was stated in the argument, and the court believes it to be a fact, that the customary way of selling buns and cakes has, for all of these years, been by the dozen and not by the pound. There has been no attempt up to the present time to enforce the selling of these articles by weight, through prosecutions.

The claim was made in this argument that the section prescribing the size of loaves is a non-constitutional provision, as it interferes with the right of contract.

A court of minor jurisdiction is loath to declare any ordinance or law void for unconstitutionality, and I, sitting in this court, have always avoided such a decision unless the law was so clearly unconstitutional that I could not sustain it. Had the present law, in Section 2, prescribed only the minimum

amount or size of the bread, and not fixed a maximum above which the loaves could be baked, with a provision that bread sold by the loaf should not contain less than a certain specified number of ounces, I should be very loath to declare the law unconstitutional; but should have remitted the remedy of the defendant to an appeal to the higher court. But that is not the provision of the ordinance in question. It not only prescribes that the baker shall not bake in any other sizes than there named, but has a maximum beyond which no loaf can be made. In that I think, as I have indicated during the argument of the case, the law is fatally defective. It is, in my judgment, a clear interference with the right of contract. A baker certainly has the right under his unconstitutional power over his own property to give a man, if he so desires, three or four ounces more than the regulation size loaf. To attempt to say that while a baker may not make a loaf of less than sixteen ounces, that he shall not, under any circumstances, make or sell a loaf of over eighteen ounces, is, it seems to me, a clear interference with the right of property which the Constitution of the United States guarantees to every citizen.

Upon this principle, without going into any of the other grounds which were urged in the argument of the case, and although I regret very much to interfere with a law which has been on the statute book for so long a period, I feel it my duty to hold that the law is void.

Respectfully submitted,

HARRY RUBENS,
BENJAMIN F. NINDE,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1912.

No. 115

MATHIAS SCHMIDINGER,
Plaintiff in Error.
vs.
THE CITY OF CHICAGO, ILLINOIS,
Defendant in Error.

In error to the Supreme Court of the State of Illinois.

BRIEF OF DEFENDANT IN ERROR.

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CHAMPLIN LAW PRINTING CO.

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OCTOBER TERM, A. D. 1912.

No. 115

MATHIAS SCHMIDINGER, *Plaintiff in Error.*
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In error to the Supreme Court of the State of Illinois.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

While the statement of the case made by counsel for plaintiff in error is in the main correct, the omission of some of the essential facts and inaccuracies in the statement of others impels us to direct the court's attention to the following facts appearing in the record of this case.

This is an action in debt instituted in the Circuit Court of Cook county, Illinois, by the City of Chicago, defendant in error herein, against Mathias Schmidinger, plaintiff in error, to recover penalties for the violation of an ordinance of the City of Chicago regulating the sale and prescribing the weight and quality of bread in the loaf, sold or offered for sale within the City of Chicago (Trans. 2).

The ordinance referred to is set out in *haec verba* in the declaration (Trans. 3 and 4) and is quoted in full commencing at the bottom of page 2 of the brief filed by plaintiff in error.

The declaration is in ten counts, each charging a different violation of the ordinance. The gist of these counts is stated on pages 6 and 7 of plaintiff in error's brief, but it is important to note here that in each of the *first five counts*, it is alleged that defendant sold the loaf of bread described, in the *City of Chicago* and that it was *not* sold as *stale* bread: that in each of the *last five counts* it is charged that defendant made the loaf of bread referred to, for the *purpose of sale* in the *City of Chicago* (Trans. 2-9).

Plaintiff in error traversed the declaration and each count thereof by a plea of *nil debit* (Trans. 10).

Considerable evidence was introduced upon the trial of this cause to show that under the conditions prevailing in the baking business in Chicago, the ordinance is arbitrary and unreasonable and therefore void.

We shall not attempt to review all of the evidence appearing in the record upon this subject, but will confine ourselves to pointing out some of the salient facts not clearly brought to light by plaintiff in error.

(1) In making bread, the dough is first made and then divided or scaled in units according to the *weight* of the loaf desired (Trans. 20). While it is impracticable in the ordinary course of the bakery business to scale every loaf of bread to weigh exactly as desired when baked, *the actual scaling of*

bread is very close. The difference in weight occurs by reason of the difference in the heat of the oven (Trans. 36 and 42). There is a gradual shrinkage in weight during the actual baking of the bread in the oven and after that until the bread gets stale. This shrinkage is due to the *evaporation of the water* in the process of baking, and after it is baked, the shrinkage continues by reason of the *natural evaporation of the moisture* in the bread. Necessarily the difference in weight between two loaves of bread scaled exactly alike will depend upon the length of time the bread is in the oven, the heat in the oven and the conditon of the atmosphere after it is taken from the oven (Trans. 21, 22 and 36). *The difference in the weight of two loaves of bread scaled exactly alike from the same dough is the difference in the amount of water in the bread at any particular time* (Trans. 76). Under the most favorable conditions for evaporation *if the dough is scaled at twenty ounces, the bread will weigh at least one pound until it is stale* (Trans. 46 to 48). Staleness of bread is caused by the evaporation of the moisture until the bread is dry and hard, which occurs ordinarily within from twenty-four hours to forty-eight hours after the bread leaves the oven, depending upon the size and kind of bread, the manner in which it is exposed for sale and the atmospheric conditions (Trans. 36, 37, 46).

(2) While the general public *buy* bread in five, ten, fifteen and twenty cent loaves, bakers *make* bread to be sold for five cents or multiples thereof by *weight* and not according to the size or shape (Trans. 27, 30 and 32).

(3) Bakers *aim* to have five cent loaves of bread, which are most commonly sold in Chicago, weigh *fourteen ounces* when it reaches the trade (Trans. 32).

(4) A loaf of bread weighing approximately *one pound* has been sold in Chicago for *five, six* and *seven cents* at various times (Trans. 41).

(5) Outside of the restaurant business about *ninety-five per cent* of the loaf bread sold in Chicago is sold in loaves costing five, ten and fifteen cents. Of these, *eighty-five per cent* is sold in *five* cent loaves (Trans. 103) or loaves weighing approximately *one pound.*

(6) A very inconsiderable number of loaves of bread is sold in Chicago which weigh *over six pounds* (Trans. 54, 56). There is no evidence of any *demand* for such bread. Bread for the *restaurant trade* is made in loaves varying in weight from *nine and one-half ounces,* in the form of graham bread, to *two and one-half pounds* (Trans. 83 to 96). These are sold according to size and shape and not as to weight (Trans. 83-85). There is no *demand* for bread weighing *exactly* thirty-one ounces, two and one-half pounds, one and one-half pounds, twenty-nine ounces, twenty-six ounces, seventeen and one-half ounces, sixteen ounces or two and one-quarter pounds, the weight of the loaves introduced in evidence, even by the restaurant trade (Trans. 93). These loaves could be made to accommodate the needs of the restaurant trade by complying with the ordinance if the baker changed the size of his pans in which the loaves of bread are baked for restaurant use (Trans. 93 to 96).

BRIEF OF THE ARGUMENT.

I.

THE POWER OF THE CITY OF CHICAGO TO PRESCRIBE THE WEIGHT OF BREAD IN THE LOAF IS EXPRESSLY CONFERRED BY STATUTE, AND THE DECISION OF THE SUPREME COURT OF THE STATE OF ILLINOIS IN THE CASE AT BAR PRECLUDES THIS COURT FROM QUESTIONING THE RIGHT TO EXERCISE THAT POWER BY THE CITY OF CHICAGO.

Starr & Curtis Ann. Stat. of Ill., Vol. 1 page 705; clause 52, section 1, Art. 5 of the Cities and Villages Act.

Schmidinger v. *City of Chicago*, 243 Ill. 167, 171.

Fischer v. *St. Louis*, 194 U. S. 362.

Peoples Gas Light & Coke Co. v. *Chicago*, 194 U. S. 1, affirming 114 Fed. Rep. 384, 388.

Mobile, Jackson, etc. R. R. Co. v. *Mississippi*, 210 U. S. 187.

II.

THE REGULATION OF THE WEIGHT OF BREAD IN THE LOAF HAS BEEN RECOGNIZED BY ALL COURTS AS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE.

People v. *Wagner*, 86 Mich. 594.

Paige v. *Fazackerly*, 36 Barb. 392.

Commonwealth v. *McArthur*, 152 Mass. 522.

Schmidinger v. *City of Chicago*, 243 Ill. 167.

Kansas v. *McCool*, 83 Kansas, 428.

In re Nasmith, 2 Ont. 192.

Guillotte v. *City of New Orleans*, 12 La. Ann. 432.

Mayor v. *Yuille*, 3 Ala. 137.

III.

LAWS PROVIDING FOR THE PREVENTION AND DETECTION OF IMPOSITION AND FRAUD ARE GENERALLY HELD TO BE FREE FROM CONSTITUTIONAL OBJECTION, ON THE GROUND THAT THEY ARE A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

Heath & Milligan Mfg. Co. v. *Worst*, 207 U. S. 338.

Lemieux v. *Young, Trustee*, 211 U. S. 489.

Plumley v. *Mass.*, 155 U. S. 461.

Capital City Dairy Co. v. *Ohio*, 183 U. S. 238.

Powell v. *Pennsylvania*, 127 U. S. 678.

City of Chicago v. *Bowman Dairy Co.*, 234 Ill. 294.

Waterbury v. *Newton*, 50 N. J. Law, 534.

People v. *Arensberg*, 105 N. Y. 123.

State v. *Rogers*, 95 Maine, 94.

Commonwealth v. *Waite*, 11 Allen, 264.

State v. *Cipperly*, 101 N. Y. 634, reversing 37 Hun. 219.

State v. *Campbell*, 64 N. H. 402.
State v. *Smyth*, 14 R. I. 100.
State v. *Schlenker*, 112 Iowa, 642.
State v. *Crescent Creamery Co.*, 83 Minn. 284.
State v. *Williams*, 93 Minn. 155.
State v. *Holton, Gray & Co.* (Iowa), 126 N. W. 1125.
American Linseed Oil Company v. *Wheaton*, (S. D.) 125 N. W. 127.

IV.

THE ORDINANCE IS NOT SO ARBITRARY AND UNREASONABLE IN ITS TERMS AS TO AMOUNT TO A CONFISCATION OF THE PROPERTY RIGHTS OF PLAINTIFF IN ERROR OR TO A DEPRIVATION OF HIS FREEDOM OF CONTRACT IN THE SALE OF BREAD, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

(a) Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of its police powers, and no person has such absolute and unqualified right of control over his liberty or property that it cannot be curtailed by the sovereign power of the state for the general welfare of the people.

Lochner v. *New York*, 198 U. S. 45, 53.
St. Louis, Iron Mountain, etc. Railway v. *Paul*, 173 U. S. 404, 409.
Holden v. *Hardy*, 169 U. S. 366, 391, 392.
Lawton v. *Steele*, 152 U. S. 133, 136.

(b) A very wide discretion must be given to the legislative department of government in determining the manner and extent of the exercise of the police powers of the state. "Exact wisdom and nice adaptation of remedies are not required by the fourteenth amendment, nor the crudeness, nor the impolicy nor even the injustice of state laws redressed by it."

Heath & Milligan Mfg. Co. v. *Worst*, 207 U. S. 338, 354-355.
Jacobson v. *Mass.*, 197 U. S. 11, 25, 31.
Otis v. *Parker*, 187 U. S. 606, 608, 609.
Gundling v. *Chicago*, 177 U. S. 183, 188.
Lawton v. *Steele*, 152 U. S. 133, 136.
Crowley v. *Christensen*, 137 U. S. 86, 91, 92.
Powell v. *Pennsylvania*, 127 U. S. 678, 686.

(c) The impossibility of baking a loaf of bread so that it will be of the weight prescribed in the ordinance at all times after it leaves the oven, does not render it unreasonable in view of the construction of the ordinance by the Supreme Court of the State of Illinois that it prohibits the sale of loaves of bread which are *short* in weight *only*.

In cases involving police power, the interpretation placed by the highest court of the state upon its statutes and the ordinances of its municipalities is conclusive on the Federal Court.

Smiley v. *Kansas*, 196 U. S. 447, 455.
St. Louis, Iron Mountain, etc. Railway v. *Paul*, 173 U. S. 404, 408.

M. K. & T. Railway v. *McCann*, 174 U. S. 580, 586.

Tullis v. *L. E. & W. R. R.*, 175 U. S. 348, 353.

V.

THE ORDINANCE DOES NOT BY ITS TERMS NOR IN EFFECT REGULATE THE PRICE OF BREAD.

City of Chicago v. *Schmidinger*, 243 Ill. 167, 173.

ARGUMENT.

I.

THE POWER OF THE CITY OF CHICAGO TO PRESCRIBE THE WEIGHT OF BREAD IN THE LOAF IS EXPRESSLY CONFERRED BY STATUTE, AND THE DECISION OF THE SUPREME COURT OF THE STATE OF ILLINOIS IN THE CASE AT BAR PRECLUDES THIS COURT FROM QUESTIONING THE RIGHT TO EXERCISE THAT POWER BY THE CITY OF CHICAGO.

Clause 52, section 1, article 5 of the Cities and Villages Act is as follows: (See Starr & Curtiss Ann. Stat. of Ill., Vol. 1, pages 689 and 705).

> "Section 1. The city council in cities, and the president and the board of trustees in villages, shall have the following powers: * * *
>
> "Fifty-second. To regulate the sale of bread in the city or village; prescribe the weight and quality of the bread in the loaf."

The ordinance provided that "all bread sold or offered for sale in the City of Buffalo wherever baked shall be made into loaves weighing not less than one and one-half pounds each."

The court, after discussing the power of the state to regulate a lawful trade in the exercise of the police power vested in it, on page 434, said:

> "The difficulty is, in a particular case, to determine where the ordinance in the restraint of trade transcends the power of the legislative body by its infringement upon the rights of the individual. If the purpose to be obtained is for the public health or comfort, or the public weal generally, then the rights of the individual must yield to the common good. In this case no good to the public is apparent. Bread of the same composition, weighing one pound, is equally wholesome as a loaf half a pound larger. There is no advantage to the public on the score of economy as the price is ratable the same. *There is no pretense of any attempt to cheat in the weight*, and no question of inspection is involved."

In the *Buffalo* case, *supra*, the court did not pass upon the constitutional right of the state or of the city, under a proper delegation of power, to enact a law regulating the weight of bread in the loaf, designed to protect the public against imposition and fraud. In truth, the Supreme Court of the State of New York in the case of *Paige* v. *Fazackerly*, 36 Barb. 392, on page 394 held:

> "There is no doubt that a city ordinance regulating the weight of bread is a valid police regulation."

The case last quoted was not decided by a court of last resort, but for that matter, neither was the *Buffalo* case referred to, and moreover, the principle of law announced by the Supreme Court of New York was not overruled by the *Buffalo* case.

Probably the leading case on the subject is that of *People* v. *Wagner*, 86 Mich. 594, quoted and discussed in the brief of plaintiff in error. Counsel attempt to distinguish that case from the one at bar, on the ground that the Detroit ordinance which was the subject of review in the *Wagner* case was reasonable in its terms; that it adopted in the form of law the usage and custom of the bakery trade in Detroit, as manifested by the following language used in the opinion of the Supreme Court of Michigan on page 599:

> "Sales are invariably made in loaves of the size of one, two or four pound packages, and the ordinance simply takes the usual and ordinary packages or loaves into which bread is made, and fixes the standard of weight of each package."

Whatever force there is in the argument of counsel for plaintiff in error, and we shall hereafter show that the ordinance of the City of Chicago is not unreasonable nor arbitrary in that respect, the *power* of the state to regulate the weight of bread in the loaf is firmly established by the *Wagner* case, *supra*, and has been generally affirmed by the courts of last resort of every state in which the question has even arisen.

See:

Commonwealth v. *McArthur*, 152 Mass. 522.
Schmidinger v. *Chicago*, 243 Ill. 167.
Kansas v. *McCool*, 83 Kans. 428.
In re Nasmith, 2 Ont. 192.
Guillotte v. *City of New Orleans*, 12 La. Ann. 432.
Mayor v. *Yuille*, 3 Ala. 137.

Counsel for plaintiff in error distinguish the *New Orleans* and *Mobile* cases last cited from that at bar because they involve what is commonly known as assize ordinances—ordinances regulating the price of bread in connection with the weight. We do not pretend that the distinction is not well founded, but we do contend that there is ample authority in the bakery cases hereinabove cited as well as in cases which we will hereafter discuss for upholding legislation regulating the weight of bread in the loaf.

III.

LAWS PROVIDING FOR THE PREVENTION AND DETECTION OF IMPOSITION AND FRAUD ARE GENERALLY HELD TO BE FREE FROM CONSTITUTIONAL OBJECTION, ON THE GROUND THAT THEY ARE A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

The only feature of the ordinance in question against which plaintiff in error complains is that fixing the weight of bread in the loaf. (See brief of plaintiff in error, page 15.) The apparent purpose of that feature of the ordinance is to guard the

public against imposition and fraud in the sale of bread of short weight.

Opposing counsel contend that the provision of the ordinance requiring that the weight of the loaf of bread in each instance be plainly printed on a label sufficiently meets the necessity of protecting the public against fraud, and that the provision in the ordinance prohibiting the sale of bread or the making of bread for the purpose of sale in weights substantially differing from those prescribed, is an arbitrary interference with the right of plaintiff in error to pursue a lawful calling. However counsel for plaintiff in error may differ with the lawmakers of the City of Chicago in the wisdom or propriety of the provisions of this ordinance, it cannot be said that the city council of the City of Chicago in attempting to pass an ordinance with a view only to prevent fraud should stop with the provision that the weight of bread in the loaf shall be plainly marked so that the public may be apprised of the weight of the bread which they buy.

In a community like Chicago, there is necessarily a large number of illiterate people, who, perhaps, need greater protection than others. And what court can say that the city council of the City of Chicago did not have in mind this very fact when they provided standard loaves of bread, the weight of which could be recognized by their size as well as by their labels.

In the well considered case of *Plumley* v. *Mass.*, 155 U. S. 461, this court held that a law of Massachusetts forbidding the coloring of oleomargarine

in imitation of pure butter, even though the package is in separate and distinct form and plainly marked so as to advise the consumer that it is oleomargarine and not dairy butter, is valid as a police regulation. On page 472, the court said:

> "If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products."

To the same effect is *Powell* v. *Pennsylvania*, 127 U. S. 678.

In *Heath & Milligan Mfg. Company* v. *Worst*, 207 U. S. 338, this court held that an act of the State of North Dakota requiring that if other than linseed oil is used in the preparation of mixed paints for the purpose of sale, the names of such oils or substitutes shall be shown together with the percentage thereof, is a valid police regulation to prevent fraud.

In *Lemieux* v. *Young, Trustee*, 211 U. S. 489, it was held to be within the police power of the state to regulate the sales of entire stocks in trade of merchants so as to prevent fraud on innocent creditors.

In *State* v. *Schlenker*, 112 Iowa, 642, it was held that a law prohibiting the adulteration of milk, though healthful, may be passed by the state to prevent fraud.

A statute prohibiting the sale of cream containing less than twenty per cent of fat, even though unadulterated, has been upheld, not as a health measure, but for the purpose of preventing fraud.

State v. *Crescent Creamery Company*, 83 Minn. 284.

A number of other cases has been cited in our brief under this point to which we will make no further reference. They all indicate that it is within the police power of the state to pass laws fixing various standards for articles of food and commerce for the prevention and detection of imposition and fraud in the sale thereof.

IV.

THE ORDINANCE IS NOT SO ARBITRARY AND UNREASONABLE IN ITS TERMS AS TO AMOUNT TO A CONFISCATION OF THE PROPERTY RIGHTS OF PLAINTIFF IN ERROR OR TO A DEPRIVATION OF HIS FREEDOM OF CONTRACT IN THE SALE OF BREAD, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

(a) One of the chief contentions of plaintiff in error is, that he is, by the ordinance, prohibited from making and selling bread in weights other than those prescribed in the ordinance, although there is a demand for such bread. A cursory examination of the evidence in the record will disclose that the complaint is based upon hypothetical rather than real and actual conditions in Chicago.

Outside of the restaurant trade, ninety-five per cent of all the bread made for the purpose of sale

is sold in five cent loaves or multiples thereof. Of these, eighty-five per cent is sold in five cent loaves which approximate one pound in weight. A very inconsiderable number of loaves of bread which weigh over six pounds is sold in Chicago. These loaves are sold only in certain foreign quarters. There is no evidence of any demand for such bread. There is no evidence that in these foreign quarters the people would not buy a six pound loaf and a two pound loaf or two four pound loaves, if they desired and could not get an eight pound loaf of bread.

Eight different sizes of bread may be made under the ordinance. One may buy an one-half pound loaf and a pound loaf if he wants a pound and a half of bread. There is nothing to prevent the cutting up of a loaf of bread and the sale of the parts. There is in fact the greatest possible liberality in the terms of the ordinance at all consistent with the fixing of standard weights of bread in the loaf.

Bread for the restaurant trade is made in loaves varying in weight from nine and one-half ounces, in the form of graham bread, to two and one-half pounds. There is no demand for bread weighing exactly as those introduced in evidence even by the restaurant trade. These loaves could be made to accommodate the needs of the restaurant trade by complying with the ordinance, if the baker changed the size of his pans in which the loaves are baked for restaurant use. It appears to be clear that the restaurant and hotel proprietors would buy all the bread necessary for their purposes and uses if graham bread were made in loaves weighing eight ounces instead of nine and one-half ounces, or if

other bread were made in two pound loaves instead of thirty-one and one-half ounces, twenty-nine ounces or twenty-six ounces, or in one pound loaves instead of seventeen and one-half ounces, if made in the shapes to fit the cutting machines used by restaurants and hotels.

However, even if plaintiff in error is, in some measure, restrained in the exercise of his discretion or in the fulfilment of any demand for bread in loaves of other weights than those provided in the ordinance, such inconvenience or restraint is but an incident to the right of the state to regulate the control of persons and property for the general welfare of the public.

No person has such an absolute and unqualified right of control over his liberty or property that it can not be curtailed by the exercise of the police power of the state. Every police measure in some degree restrains the liberty of the person or regulates the use of property so as to interfere with the unqualified right of contract.

In the cases already cited, it appears that a demand for oleomargarine colored to give the appearance of butter could not be satisfied in violation of a statute prohibiting the coloring of oleomargarine. A demand for milk adulterated with pure water could not be satisfied in violation of a statute prohibiting the sale of adulterated milk. Cream containing less than twenty per cent of fat unadulterated can not be sold to a person who demands such cream in violation of a statute. Persons engaged in occupations injurious to health

can not contract to work more than a certain number of hours in violation of a statute.

In *Lochner* v. *New York*, 198 U. S. page 45, a case cited by counsel for plaintiff in error, the court said, on page 53:

> "There are, however certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any atempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the fourteenth amendment was not designed to interfere. *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624.
>
> "The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the fourteenth amendment."

In *St. Louis, Iron Mountain, etc. Railway* v. *Paul*, 173 U. S. 404, at page 409, this court said:

> "Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the state, we do not think that conclusion in its

> application to the power to amend can be disputed on the ground of infraction of the fourteenth amendment. *Orient Insurance Company* v. *Daggs*, 172 U. S. 557; *Holden* v. *Hardy*, 169 U. S. 366; *St. Louis & San Francisco Railway* v. *Matthews*, 165 U. S. 1."

Any number of cases may be cited announcing this very elementary principle of the law of the police power of the state, but further discussion of this subject would serve no useful purpose.

(b) In the course of the argument by counsel for plaintiff in error, they distinguish between ordinances regulating the weight of bread, on the ground that some are apparently reasonable in their terms, while in the case at bar, the ordinance appears to be unreasonable.

The power of the state to regulate the weight of bread in the loaf having been established beyond doubt, the question of the manner or extent of such regulation—the question as to what weights shall be established as standard weights is one for the legislature to determine and not for the judiciary. A very wide discretion must be given to the legislative department of government in determining the manner and extent of the exercise of the police power of the state.

In *Heath & Milligan Mfg. Co.* v. *Worst*, 207 U. S. 338, discussing the question of the reasonableness of a statute prescribing a standard of purity for paints, this court said on page 354:

> "Evils must be met as they arise and according to the manner in which they arise. The

> right remedy may not always be apparent. Any interference, indeed, may be asserted to be evil, may result in evil. At any rate, *exact wisdom and nice adaptation of remedies are not required by the fourteenth amendment; nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it.*"

In *Otis* v. *Parker*, 187 U. S. 606, Mr. Justice Holmes in delivering the opinion of the court said on page 608:

> "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise, a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.
>
> "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable in-

> fringement of rights secured by the fundamental law.' *Booth* v. *Illinois*, 184 U. S. 425, 429."

(c) It is further contended by plaintiff in error that the impossibility of scaling dough so that when baked the bread will weigh as required by ordinance, is proof of the fact that the ordinance is arbitrary and unreasonable.

The ordinance, as construed by the Supreme Court of the State of Illinois, does not prohibit the making of bread for the purpose of sale in weights *exceeding* those provided therein. The prohibition is only against the making, for the purpose of sale, and the selling of bread which is *short* in weight. (See *Schmidinger* v. *City of Chicago*, 243 Ill. 167, 173.) The construction placed upon this ordinance by that court is conclusive here.

In *Smiley* v. *Kansas*, 196 U. S. 447, at page 455, this court said:

> "It is well settled that in cases of this kind the interpretation placed by the highest court of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. L., I. M. & St. P. Ry. Co.* v. *Paul*, 173 U. S. 404, 408; *M., K. & T. Ry. Co.* v. *McCann*, 174 U. S. 580, 586; *Tullis* v. *L. E. & W. R. R. Co.*, 175 U. S. 348."

It is urged, however, that the weight of bread varies according to the heat of the oven in which it is baked and the atmospheric conditions after the bread leaves the oven. There is a gradual shrinkage in weight, on account of the evaporation of the moisture, and to be sure that bread will, under all condi-

tions, weigh at least one pound until it becomes stale, it is necessary for bakers to allow at least four ounces for shrinkage and inaccuracy in scaling. This, they contend, amounts to a confiscation of their property without due process of law.

Inasmuch as the difference in the weight of two loaves of bread scaled exactly alike is the difference in the amount of *water* in that bread at any particular time, it can hardly be said that the ordinance confiscates the property of the plaintiff in error.

If the evidence introduced upon this point, sheds any light upon the facts, there can be but one conclusion, viz.; that under the most favorable conditions for evaporation within the experience of bakers, dough scaled at twenty ounces will weigh at least one pound until it is commonly sold as stale bread. Suppose, then, on a damp and cloudy day, dough is scaled at twenty ounces and baked into a loaf of bread, and assume that the loaf will weigh at least eighteen ounces for forty-eight hours after it is baked, what will be the loss to the baker? *Apparently two ounces of water.*

But it is further argued that there is no definite period in which bread will always become stale. The staleness of bread depends also upon atmospheric conditions, it being caused by the evaporation of the moisture in the bread until it becomes dry and hard.

Our answer is, that the ordinance places the control of that uncertainty entirely in the vendor of bread. It provides that the ordinance shall not apply to bread *sold* as stale.

V.

There remains but one point urged by counsel for plaintiff in error in this case—that is, that the real purpose of the ordinance is to regulate the *price* of bread, and that inasmuch as the cost of bread to the baker has been given no consideration, the ordinance is arbitrary and unreasonable and amounts to a confiscation of the property rights of plaintiff in error.

This argument is based upon the fact that bread has been commonly sold in Chicago in five cent loaves or multiples thereof. The weight of the loaf has heretofore been regulated by bakers according to the fluctuations in the cost of material and labor, and it is charged that the ordinance in question in effect compels bakers to sell a pound loaf of bread for five cents and a two pound loaf of bread for ten cents irrespective of the cost thereof.

Our only answer to this contention is that the ordinance does not, by its terms, make any reference to the price of bread, and there is nothing to prevent bakers from selling a pound of bread at five or six cents as has been done at times, or from selling a three-quarter pound loaf of bread for five cents as is done in Chicago today.

What this court said in the *Northern Securities* case in 193 U. S., at page 351, is applicable to the point under discussion and we shall conclude with a quotation therefrom:

> "But even if the court shared the gloomy forebodings in which the defendants indulge, it

could not refuse to respect the action of the legislative branch of the government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of congress or are interested in the result of this particular case."

Respectfully submitted,

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